Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	MB Docket No. 06-189

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE U.S. CONFERENCE OF MAYORS

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The National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), the National Association of Counties ("NACo"), and the U.S. Conference of Mayors ("USCM") submit these comments in response to the Notice of Inquiry, released October 20, 2006, in the above-captioned proceeding ("NOI").

NATOA's membership includes local government officials and staff from across the nation whose responsibilities include the development and administration of cable franchising and telecommunications policy for the nation's local governments.

NLC is the oldest and largest national organization representing municipal governments throughout the United States. It serves as a resource to and an advocate for more than 18,000 cities, towns, and villages in furtherance of its mission to strengthen and promote cities.

NACo is the only national organization that represents county governments in the United States. It serves as a national advocate for counties; acts as a liaison with other levels of government; and provides legislative, research, technical and public affairs assistance to its members.

The USMC is the official nonpartisan organization of the nation's 1,183 cities with populations of 30,000 or more. Its mission is to promote effective national urban/suburban policy, strengthen federal-city relationships, and ensure that federal policy meets cities' needs.

These associations previously filed Comments, Reply Comments, and *ex parte* materials in the Commission's franchising proceeding, MB Docket No. 05-311, the Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("NPRM"). Because the NOI raises many of the same issues and seeks comment on topics that were addressed by our filings in the NPRM, copies of these materials are attached hereto for inclusion in this proceeding.

I. Local Franchising Authorities Seek Competition

As is made abundantly clear in the NPRM record, local franchising authorities ("LFAs") across the nation seek and encourage video competition in their communities. At the same time, however, LFAs are not willing to disregard their duties and responsibilities owed to their constituents in their quest to bring competitive choices to their residents. LFA oversight helps to ensures that all residents share in the benefits that advanced telecommunications services bring, that public, education, and government access channels are adequately funded, and that taxpayers receive reasonable compensation for the use of public rights-of-way by private industry.

For decades, the local franchising process has been successful in balancing the unique needs and interests of a community with the provision of cable services. Time Warner Cable Inc. has stated that LFAs have welcomed video competition and have "acted in a reasonable and timely fashion in granting franchise applications."[1] In fact, since the early 1980s, Comcast has grown from approximately 100 franchises to over 6000 franchises today.[2]

The NPRM record is replete with examples where LFAs have gone out of their way to encourage the telecos to offer cable service in their communities. For example, on March 21, 2006, the Michigan Municipal League hosted an event at the state capital where elected officials from across the state invited AT&T and Verizon to offer more cable television service in local communities. And a number of Michigan communities have adopted ordinances supporting competition and expedited franchising.[3]

Yet despite efforts to encourage competition and the obvious success of the local franchising process, the telecos complain that LFAs – and the franchising process – are to blame for their delay in entering the video marketplace. But their complaints ring hollow when one considers that:

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[1] *See ex parte* letter of Fleischman and Walsh, L.L.P., filed November 10, 2006, in MB Docket No. 05-311.
[2] *See ex parte* letter of Willkie Farr & Gallagher LLP, filed October 31, 2006, in MB Docket No. 05-311.
[3] *See* Reply Comments of Michigan Municipal League, et al., filed March 28, 2006, in MB Docket No. 05-311.

- In 2001, the telecos "held traditional video franchises covering 63 million homes in the country," which they subsequently abandoned;[4]
- That the telecos have obtained franchises covering more than 2 million households in the second and third quarters of 2006;[5] and
- That because of construction timelines, the telecos have plenty of time within which to obtain traditional franchises.[6]

But the telecos may be changing their tune.

II. Local Franchising Process is Not a Barrier to Entry

In September 2006, Verizon officials publicly acknowledged that franchising was not an issue for the company and that the process was not holding back the company in the deployment of video services. Indeed, at the time, Verizon held 161 franchises passing 3.3 million households, with the expectation of holding 300 franchises passing 6 million households by the end of 2006.[7]

But regardless of how impressive these statistics may be, one stands out from all the rest. Not ***once*** has the company been denied a video franchise.

III. Reasonable Build-out Requirements is Not a Barrier to Entry

The telecos have repeatedly asserted in the NPRM that local build-out requirements are a barrier to entry. But local government organizations, the cable industry, consumer groups, and others have all filed comments in the NPRM that totally refute this position, both from a legal and a public interest standpoint. And based on recent comments by the telecos regarding some recent state franchising legislation, perhaps the telecos have been paying attention to these arguments.

For example, when New Jersey enacted its franchise legislation, Dennis M. Bone, President of Verizon New Jersey, applauded the legislation as "another big step in the right direction." It is interesting to note that the legislation includes a build-out provision.

When franchising legislation was passed in California, Verizon West Region president Tim McCallion stated that the "bill would accelerate the deployment of this all-fiber-optic network, which sets a new standard for quality and value in television delivery to consumers across all income levels, while maintaining local government oversight in appropriate areas."[8] Like New Jersey, the California legislation includes a build-out provision.

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[4] Jon Kreucher, Forced Franchising: Why Telephone Industry Calls For "Shall Issue" Video Franchising Shouldn't Be Answered, Position Paper published by ICMA (October 2006), p. 14.
[5] *Id.* at 15.
[6] *Id.* at 16.
[7] http://investor.verizon.com/news/20060927/20060927.pdf
[8] http://arstechnica.com/news.ars/post/20060901-7641.html

Obviously, if Verizon finds that reasonable build-out requirements are not a significant barrier to competition, the Commission should come to the same conclusion.

IV. State Franchising Legislation

The telecos have been spent hundreds of millions of dollars in an effort to convince American consumers that if local franchising regulations were removed, they would see new competitors rushing into the marketplace and see reductions in their monthly cable bills. While federal franchise legislation has, to date, failed to be enacted, a number of states have proceeded with their own versions of franchise "reform". For the most part, it is too early to tell what effects these "reforms" will have on video programming competition. But we have a few hints.

A. Faster Entry

Texas enacted its statewide video franchising scheme in 2005. But by the end of 2006, roughly 16 months after the legislation was signed into law, it is estimated that the telecos will provide video competition to portions of only 42 out of 1,210 incorporated Texas communities, serving just 4% or so of the state's population.[9]

B. Lower Prices

In its Reply Comments filed March 28, 2006 in the NPRM, the National Cable & Telecommunications Association methodically explained why the telecos' claims that their entry into the video marketplace will result in significant price reductions are without basis. NCTA's position was strengthened in November 2006 when Verizon announced that it would raise the price for its FiOS television service by approximately $3 a month, an increase of approximately 7.6%. The new rate, which applies nationwide, will start in January 2007 for all new customers in Virginia, New Jersey, Texas, Massachusetts, California, Florida, New York and Maryland. (Virginia, New Jersey, Texas, and California have all recently enacted franchise legislation.)[10]

Clearly, Verizon's action in raising prices belies the telecos' continuing argument that their entry into the video programming market would bring monetary benefits to consumers in the form of lower prices.

V. Conclusion

This proceeding was initiated to determine the current status of competition in the marketplace for the delivery of video programming. As part of its inquiry, the Commission specifically seeks information on the "impact of the local franchise process on new providers' entry into local markets." As stated earlier, much of the same

[9] Jon Kreucher, Forced Franchising: Why Telephone Industry Calls For "Shall Issue" Video Franchising Shouldn't Be Answered, Position Paper published by ICMA (October 2006), p. 49-50.
[10] Http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA6393559

information addressing this issue has been submitted by us and others in the franchising docket. Indeed, over 4000 records have been filed in the NPRM to date.

In addition to what we and others have already said on this matter, we have provided additional information showing that the local franchising process is not to blame for the slow entry of the telecos into the video programming marketplace. We have provided information that franchise "reform" does not necessarily speed market entry or result in lower prices for consumers.

The local cable franchising process works and it ensures that a community's specific needs are met and that local customers are protected. And while we applaud efforts to increase competition in the video programming marketplace, we are firm in our conviction that LFAs and the local franchising process not be used as an excuse for the failure of new providers to enter into local video markets.

Respectfully submitted,

Libby Beaty
Executive Director
NATOA
1800 Diagonal Road, Suite 495
Alexandria, VA 22314
(703) 519-8035

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Attachments

cc: Marcia Glauberman, Marcia.Glauberman@fcc.gov
Anne Levine, Anne.Levine@fcc.gov
Best Copy and Printing, Inc., www.bcpiweb.com

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James N. Horwood
Tillman L. Lay
Ruben D. Gomez
SPIEGEL & MCDIARMID
1333 New Hampshire Avenue, N.W.
Second Floor
Washington, D.C. 20036
(202) 879-4000

Counsel for NATOA et al.

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SUMMARY

While the FCC may have a useful role to play by gathering data about local franchising, Title VI gives the Commission no authority to adopt rules to implement § 621(a)(1) or to adjudicate disputes arising under § 621(a)(1). Rather, the language of §621(a)(1) and § 635(a) makes plain that Congress gave authority over § 621(a)(1) to the courts, not the FCC. Moreover, even if the FCC had authority to interpret or enforce § 621(a)(1), its jurisdiction would at most be concurrent with that of the courts; thus the Commission's interpretation of § 621(a)(1) would be entitled to no deference by the courts.

The cable franchising process is inherently local and fact-specific, because the Cable Act decrees that cable franchises must ensure that "cable systems are responsive to the needs and interests of the *local* community," 47 U.S.C. § 521(2). A "one-size-fits-all" approach is antithetical to what Congress envisioned the cable franchising process to be, and Congress' decision was a wise one. But regardless whether the FCC or industry agrees, the Commission is powerless to alter the local, community-specific approach to cable franchising that Congress endorsed in the Cable Act.

LFAs nationwide welcome competition and are eager to issue additional franchises to compete with incumbent cable operators. The evidence supporting this conclusion is rather comprehensive on a nationwide scale (the only scale that should be of any relevance to the FCC here).

The conclusion that LFAs have embraced the policy behind § 621(a)(1) is further supported by the remarkable dearth of reported precedent concerning § 621(a)(1) in general, and its "unreasonable refusal" provision in particular, in the nearly fourteen years since it was

enacted. Thus, the *NPRM*'s proposal to adopt rules implementing § 621(a)(1) is a solution in search of a problem.

LFA franchising decisions are made by elected legislative bodies – city councils, county councils and commissions, and town councils. The Commission can rest assured that LFAs' constituents want cable competition. That is a far more effective, and democratic, check on unreasonable refusals to award competitive franchises than any FCC rules could ever provide.

A principal moving force behind the *NPRM* appears to be complaints to the FCC by AT&T (formerly SBC), Verizon and other RBOCs about the supposed difficulties they claim to have encountered in the local franchising process. While we welcome the RBOCs' belated interest in finally entering the market to compete with incumbent cable operators, the Commission should not be misled by attempts to shift blame to LFAs for delays resulting from the RBOCs' own business decisions.

The 1996 Act repealed the telephone-cable crossownership prohibition and gave the RBOCs (and other ILECs) not one, but *four* different means to enter the multichannel video market. Yet, for eight or more of the nearly ten years since the 1996 Act was passed, the RBOCs, and especially AT&T and Verizon, made no serious effort to enter the multichannel video market as a cable operator, a video common carrier or an open video system operator. AT&T (in its former incarnation as SBC), not only did not pursue entry into the cable market, but took affirmative steps to *exit* that market. Although RBOCs such as Verizon and AT&T were certainly free to make their own business decisions not to enter (or to exit) the cable market despite the invitation Congress gave them in the 1996 Act, they are not free – or at least certainly should not be free – to turn around and blame LFAs and the local franchising process for the

consequences of their own business decisions to delay entry into (and in AT&T's case, to exit) the market.

The short answer to the *NPRM*'s question, "should cable service requirements vary greatly from jurisdiction to jurisdiction?," is "yes." Indeed, not only should such requirements vary, the Cable Act decrees that they *must* vary, for the Act is built on the principle that cable systems must be "responsive to the needs and interests of the *local* community."

The RBOCs' complaint about how long it supposedly takes to obtain a franchise rests on mischaracterizations and willful balking at the locally-oriented nature of cable franchising that the Cable Act requires. AT&T is in no position to complain about the length of the franchising process. It has never bothered to try. Verizon, unlike AT&T, has sought franchises. We have no doubt that Verizon (and any other newcomer) would be able to obtain local franchises almost as quickly as it wants (and certainly faster than Verizon and AT&T have to date been able to provide cable service on a commercial basis in the markets they seek to enter) if the new provider were willing to agree to franchise terms comparable to those imposed on the incumbent cable operator.

Thus, the issue is not whether LFAs are eager to grant competitive franchises; LFAs unquestionably are. The issue is how willing parties like Verizon are to agree to franchise terms that are, as the Cable Act requires, responsive to *local* community cable-related needs and interest. Verizon's complaints about supposed "delay" in the franchising process are thus, in many respects, really a complaint about the local community needs-based model of franchising that is one of the cornerstones of the Cable Act. The FCC should not, and cannot, rewrite the Cable Act to suit industry's preferences.

The § 621(a)(3) prohibition on red-lining and the § 621(a)(4)(A) requirement of a reasonable time to build out a cable system embody the Cable Act's policy of encouraging cable system buildout. And it is a policy that has served the nation well. Cable modem service is the most widely available form of broadband available to Americans today, and local franchise buildout requirements had a hand in that.

While franchise buildout requirements do (and should) vary from community to community based on such factors as geographic size, topography, household density, and neighborhood dispersion, such buildout requirements typically have two critical features that are designed to make buildout as widespread as possible while, at the same time, accommodating economic constraints faced by the cable operator. First, buildout requirements typically have a household density limitation. Second, buildout requirements also invariably provide the operator with a time period to complete building out its system in the franchise area.

When properly understood, buildout requirements should be a problem for the RBOCs only if their business plans are to provide new service only to selected demographic neighborhoods of a community. But if that is indeed the business plan, then local franchise buildout requirements will be essential if the Cable Act's goals are to be protected.

Public, educational and governmental ("PEG") access channel capacity, facilities and equipment requirements, along with institutional network ("I-Net") requirements, are among the most vital elements of the local community cable-related needs and interests that the Cable Act was designed to preserve and protect. Because they are based on each community's own unique local needs, PEG and I-Net requirements vary considerably from community to community. And that is precisely what Congress intended.

Title VI certainly cannot plausibly be construed to grant the FCC authority to become a sort of national franchising authority or national LFA oversight board, either generally or, particularly, in the case of local franchising decisions under § 621(a)(1). Yet that is what adoption of Commission rules or "best practices" with respect to § 621(a)(1) would be.

The *NPRM* (at ¶ 22) questions how what it claims is the "primary justification for a cable franchise" – an LFA's "need to regulate and receive compensation for the use of public rights-of-way" – "applies" in the case of franchise applicants, such as ILECs, that are already authorized to use those rights-of-way ("ROW") to provide telephone service. This question reflects a disturbingly flawed and crabbed understanding of the public obligations embodied in local cable franchising that the Cable Act preserves.

To be sure, the fact that a competitive franchise applicant is also the local ILEC will have an effect on the local franchising process. In the case of a local ILEC applicant, for instance, inquiry into the applicant's financial, technical and legal qualifications can usually be dispensed with. But an applicant's status as a local ILEC would have little or no affect on other aspects of cable franchising. PEG and I-Net requirements, for example, would be unaffected. The same would be true of franchise fee requirements, customer service standards, buildout requirements and police power requirements.

These are requirements that the Cable Act has decreed are necessary if a cable system is to be truly responsive to *local* community needs and interests. This structure ensures that at least one form of local media is in fact locally-responsive in what has become an era of increasingly consolidated, "cookie-cutter" national media. That, we submit, is a very valuable public benefit that the Cable Act rightly, and as it turns out, presciently preserves.

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The National Association of Telecommunications Officers and Advisors ("NATOA"), the National League Of Cities ("NLC"), the National Association of Counties ("NACO"), the U.S. Conference of Mayors ("USCM"), the Alliance for Community Media ("ACM"), and the Alliance For Communications Democracy ("ACD"), submit these comments in response to the Notice of Proposal Rulemaking, released November 18, 2005, in the above-captioned proceeding ("*NPRM*").

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USCM is the official nonpartisan organization of the nation's 1,183 U.S. cities with populations of 30,000 or more. Its mission is to promote effective national urban/suburban policy, strengthen federal-city relationships and ensure that federal policy meets urban needs.

ACM is a nonprofit, national membership organization that represents 3,000 public, educational and governmental cable television access organizations and community media centers across the nation. It pursues its mission of assuring access to electronic media for all through its legislative and regulatory agenda, coalition building, public education, and grassroots organizing.

ACD is an advocacy group for public access television, dedicated to preserving and strengthening community access to media through educational programs and participation in court cases involving franchise enforcement and constitutional questions about community television.

The rules proposed in the *NPRM* would, if adopted, represent an unprecedented and unlawful encroachment by the FCC upon the historically-recognized authority of local franchising authorities over the local cable franchising process, an authority that Congress explicitly intended to preserve in the Cable Communications Policy Act of 1984,[1] and reaffirmed again in the Cable Television Consumer Protection and Competition Act of 1992.[2] Accordingly, we file these comments to register with the Commission our strong opposition to the *NPRM*.

INTRODUCTION

While the FCC may have a useful role to play by gathering data about local franchising, Title VI gives the Commission no authority to adopt rules to implement § 621(a)(1) or to adjudicate disputes arising under § 621(a)(1). Moreover, even if the FCC had authority to interpret or enforce § 621(a)(1) (which it does not), its jurisdiction would at most be concurrent with the jurisdiction of courts under § 635(a)[3] to construe and enforce § 621(a)(1); thus the Commission's interpretation of § 621(a)(1) would be entitled to no deference by the courts.

Given these clear legal limitations, it is difficult to see what purpose the *NPRM* can meaningfully serve, other than as a forum for industry (primarily ILECs, in particular the RBOCs, but to a lesser extent, the incumbent cable industry) to exploit their superior resources and FCC contacts to vilify local franchising authorities ("LFAs") with unsubstantiated, unparticularized, and self-serving "alle[gations]"[4] and "indications"[5] of supposed LFA behavior.

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[1] Pub. L. No. 98-549, 98 Stat. 2779 (1984), codified as Title VI of the Communications Act of 1934, 47 U.S.C. §§ 521 *et. seq.* ("1984 Cable Act" or "1984 Act").
[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified in amendments to Title VI of the Communications Act of 1934 ("1992 Cable Act" or "1992 Act").
[3] 47 U.S.C. § 555(a).
[4] *NPRM* at ¶ 1.
[5] *Id.* at ¶ 5.

Any record compiled in this proceeding would inherently be anecdotal and thus misleading,[6] providing a shaky foundation upon which to rest any reliable conclusions or sound policy. That is especially true since the cable franchising process is, as Congress intended it to be, inherently local and fact-specific, because cable franchises are designed to ensure that "cable systems are responsive to the needs and interests of the *local* community," 47 U.S.C. § 521(2) (emphasis added).

A "one-size-fits-all" approach is antithetical to what Congress envisioned the cable franchising process to be, and we believe Congress' decision was a wise one. But regardless whether the FCC or industry disagrees with that, the Commission is powerless to alter the local, community-specific approach to cable franchising that Congress endorsed in the Cable Act.

Subject to these rather substantial caveats, we respond to the *NPRM* below. Part I demonstrates why the FCC lacks the legal authority to adopt rules or enforce § 621(a)(1). Part II responds to the factual questions raised in Part III(A) of the *NPRM*, and Part III deals with Part III(C) of the *NPRM*'s request for comment on proposed rules under § 621(a)(1).

I. THE COMMISSION LACKS LEGAL AUTHORITY TO CONSTRUE OR ENFORCE SECTION 621(a)(1).

The *NPRM* improperly ascribes to the Commission an authority that Congress specifically gave to the courts, not the FCC. Despite plentiful indications of a contrary legislative intent, the *NPRM* tentatively concludes that the FCC has authority to adopt rules

[6] The *NPRM* (at ¶ 8) characterizes as "anecdotal" evidence "that new entrants have been able to obtain cable franchises," a characterization that seems peculiar in light of the fact that the undescribed and undocumented "alleg[ations]" and "indications" to the contrary by industry to which the *NPRM* refers (at ¶¶ 1 & 5) can themselves only charitably be described as anecdotal.

concerning, and to enforce, Section 621(a)(1). *NPRM* at ¶¶ 15-18. The *NPRM*'s tentative conclusion is wrong.

A. Section 635(a) Gives Jurisdiction Over Section 621(a)(1) To The Courts, Not The FCC.

The *NPRM*'s tentative conclusion that the Commission has "authority to implement Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises" is based on the view that the FCC is specifically "charged by Congress with the administration of Title VI, which, as courts have held, necessarily includes the authority to interpret and implement Section 621." *NPRM* at ¶ 15. But the *NPRM* has misread Title VI and, more specifically, §§ 621(a)(1) and 635(a). Although the Commission may have authority to interpret certain provisions of Title VI, it does not have such blanket authority over all of Title VI, and it most certainly does *not* have such authority with respect to § 621(a)(1), because § 635(a) explicitly gives that authority to the courts, *not* the FCC. This conclusion is supported not only by the express language of the statute, but also the overall structure of Title VI and an extensive trail of legislative and regulatory history pertaining to § 621 in particular, and the Cable Act in general.

1. The *NPRM*'s Claim of Legal Authority To Implement Section 621(a)(1) Ignores The Plain Language of Title VI.

There is no dispute that § 621a)(1) is a "federal-level limitation" on the local cable franchising process. *NPRM* at ¶ 4. But that is not the issue. The real issue, which the *NPRM* obscures, centers on the question of which forum – the courts or the Commission – has the authority to interpret and enforce § 621(a)(1). Sections 621(a)(1) and 635(a), when read together, point unequivocally to the conclusion that enforcement authority for § 621(a)(1) rests exclusively with the courts.

Because the "first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself[,]" *A.C.L.U. v. F.C.C.*, 823 F.2d 1554, 1568 (D.C. Cir. 1987); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985), we turn first to the text of the statute. In the 1992 Cable Act, Congress simultaneously amended both § 621(a)(1) and § 635(a), the provision governing court review of certain Cable Act provisions. These two provisions were amended as follows:

> [Section 621](a)(1) A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; ***except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of Section 635 for failure to comply with this subsection.***
>
> [Section 635](a) Any cable operator adversely affected by any final determination made by a franchising authority under Section ***621(a)(1),*** 625 or 626 may commence an action within 120 days after receiving notice of such determination, which may be brought in –
> (1) the district court of the United States for any judicial district in which the cable system is located; or
> (2) in any State court of general jurisdiction having jurisdiction over the parties.

47 U.S.C. § 541(a)(1) & 47 U.S.C. § 555(a), respectively (emphasis added to indicate 1992 amendments).

Nor was the simultaneous amendment of §§ 621(a)(1) and 635(a) in this way some mere coincidence. To the contrary, the two changes were inextricably linked to one another in the same subsection of the 1992 Act:

> *SEC. 7. AWARD OF FRANCHISES; PROMOTION OF COMPETITION.*
> *(a) Additional Competitive Franchises.—*

> *(1) AMENDMENT.—Section 621(a)(1) of the Communications Act of 1934 (47 U.S.C. 541 (a)(1)) is amended by inserting before the period at the end of [sic] the following: "; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635 for failure to comply with this subsection".*
> *(2) CONFORMING AMENDMENT.—Section 635(a) of the Communications Act of 1934 (47 U.S.C. 555(a)) is amended by inserting "621(a)(1)," after "section".*[7]

The *NPRM* seems completely oblivious to the fact that the 1992 Act simultaneously amended § 635(a) to add § 621(a)(1) to the short list of provisions of the Cable Act (the other two being the franchise modification provision of § 625 and the franchise renewal provision of § 626) for which Congress explicitly assigned review to the courts. Congress specifically created a right of action for any aggrieved cable operator "adversely affected" by any "final" decision made by a franchising authority under 621(a)(1). 47 U.S.C. 555. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("Congress established an enforcement scheme independent of the Executive and provided aggrieved [private parties] with direct recourse to federal court where their rights under the statute are violated").

Thus, the amendment to § 635(a), giving courts power to review § 621(a)(1) decisions, went hand-in-hand with the § 621(a)(1) amendment that the *NPRM* claims purportedly gives the Commission the power to implement § 621(a)(1). Given the inextricable link between the § 621(a)(1) and § 635(a) amendments, however, these amendments must both be read together in order to reveal their intended meaning. And the only plausible way to read them together is that if an LFA violates the "unreasonable refusal" provision of § 621(a)(1), Congress intended that the remedy lies with the courts, *not* the Commission.

[7] 1992 Cable Act, § 7, 106 Stat. at 1483.

The Conference Report to the 1992 Act confirms what the plain language already makes clear. It explains that the inclusion of § 621(a)(1) within § 635(a)'s statement of jurisdiction was no mere coincidence but a "conforming amendment."[8] In light of this, there can be no question that Congress intended the courts to be the exclusive remedy for "unreasonably refused" cable franchise applicants. The *NPRM's* reading, by contrast, disregards the plain unambiguous language of these two interrelated amendments in the 1992 Act, effectively rendering the 1992 Act's amendment of § 635(a) mere surplusage. But "[t]here is a presumption against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective." *United States v. Blasius*, 397 F.2d 203, 207 n. 9 (2d Cir. 1968).

The *NPRM* (at ¶ 15) is therefore simply wrong in asserting that the language of § 621(a)(1), when coupled with the simultaneous amendment of § 635(a), "indicate[s] that Congress considered the goal of greater cable competition to be sufficiently important to justify the Commission's adoption of rules." Indeed, the *NPRM* stands the 1992 Act's amendment of §635(a) on its head, for it would allow the Commission to usurp the authority Congress specifically gave to the courts under § 635(a). The *NPRM*'s construction thus violates the plain meaning of the statutory language. *See, e.g., GTE Service Corp. v. FCC*, 205 F.3d 416, 421 (D.C. Cir. 2000); *City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999). Because the drafters of the 1992 Act explicitly linked the "unreasonable refusal" provision of § 621(a)(1) with their simultaneous amendment of § 635(a) to include § 621(a)(1) jurisdiction, the only reasonable reading of these amendments is that Congress intended that, as is the case with franchise modification and renewal claims under §§ 625 and 626, interpretation and enforcement authority with respect to § 621(a)(1) resides exclusively with the courts, *not* the FCC.

[8] *See* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 25-26 (1992) ("*1992 Conf. Report*").

It is no response to suggest that § 635(a)'s inclusion of § 621(a)(1) was intended only to give courts concurrent jurisdiction with the FCC over § 621(a)(1). To the contrary, reading § 635(a) as only granting courts concurrent jurisdiction with the FCC would render § 635(a) surplusage. The law is clear that courts already share concurrent jurisdiction with the FCC with respect to a number of other Title VI provisions that are not specifically enumerated in § 635(a). *See, e.g., Time Warner Cable of New York City v. City of New York*, 118 F.3d 917 (2d Cir. 1997) (holding courts have jurisdiction in a PEG programming matter although § 611 is not listed in § 635); *Charter Communications v. County of Santa Cruz*, 304 F.3d 927 (9th Cir. 2002) (construing § 617 regarding franchise transfers even through § 617 not listed in § 635(a)); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993) (court construes § 621(a)(2) even though § 621(a)(2) is not listed in § 635(a)); *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993) (same); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 182 (1993) (same); *Cable Investments, Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989) (same); *A.C.L.U.*, 823 F.2d at 1573-74 (holding that the courts and the FCC share concurrent jurisdiction in franchise fee matters even though § 622 is not listed in § 635(a)).

The general structure of Title VI and the necessity of imparting an effective meaning to § 635(a) render untenable the proposition that the FCC can claim concurrent jurisdiction with respect to § 621(a)(1). Given that the courts already share concurrent jurisdiction with the FCC on many provisions in Title VI that are not listed in § 635(a), the only way to give § 635(a) any meaning at all is to construe it to give courts exclusive jurisdiction with regard to the three Title VI provisions it enumerates.

The *NPRM* also fails to come to grips with the careful balance that Congress struck when it made the fundamental distinction that LFAs, not the Commission, would be the sole authority on franchising. A cursory review of Title VI's allocation of responsibilities between LFAs and the FCC supports this conclusion. Congress explicitly stated where it contemplated that the FCC had a role to play in Title VI matters. For example, Title VI specifically authorizes the FCC to undertake certain regulatory responsibilities with respect to cable. *See, e.g.,* 1984 Act, § 612(e) (ruling on complaints regarding an operator's refusal or failure to provide leased access); § 613(b) (defining the "rural area" exemption from the telephone company cross-ownership ban); § 613(c) (dictating rules regarding the "ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community"); § 623(b) (adopting rules relating to regulation of cable service rates); § 624(e) (setting "technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise"); and § 634(d),(e), (f) and (g) (delineating rules and taking action to enforce cable operators' equal employment opportunity obligations).[9] Title VI also reflects Congress' intent to restrict the Commission's and LFAs' authority over cable in certain areas. *See, e.g.,* 1984 Act, § 612(b)(2) (prohibiting the allocation of capacity for leased access in excess of the statutory requirement); § 622(i) (prohibiting the FCC and any other agency from regulating the amount of franchise fees or use of funds derived from such fees); § 623(a) (limiting regulation of cable rates); and § 624(f) (limiting the authority of the FCC and LFAs over requirements regarding the "provision or content of cable services").[10] By giving the FCC a specifically defined and limited role in Title VI matters (in stark contrast to the far broader and general authority given the FCC under Titles I, II and III of the Act), Congress clearly indicated

[9] 1984 Act, §§ 612(e), 613(b) & (c), 623(b), 624(e) & 634, 98 Stat. at 2784-85, 2788-2790 & 2797-2800.
[10] *Id.* at §§ 612(b)(2), 622(i), 623(a) & 624(f), 98 Stat. at 2783, 2788 & 2790.

that the FCC would *not* play a role in other areas of Title VI, leaving those matters to LFAs and, where disputes arose, to the courts.

When Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted). Thus, Congress' explicit grant of jurisdiction over § 621(a)(1) matters to the courts precludes imputing to the FCC jurisdiction over such matters. To construe the disparity otherwise would eviscerate the plain meaning of § 635(a). On the basis of the language of the 1992 amendments, "[i]t is, in short, overwhelmingly clear that, in passing the [Act], Congress acted - as it is presumed to act. . . with full awareness." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987); *see, e.g., Lorillard v. Pons*, 434 U.S. 575, 581-582 (1978). Contrary to the *NPRM's* assertions, "we have here an instance where the Congress, presumably after due consideration, has indicated by plain language a preference to pursue its stated goals by what [the administrative agency] asserts are less than optimal means. In such a case. . . the agency is [not] free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress." *Alabama Power v. Costle*, 636 F.2d 323, 365 (D.C. Cir. 1979). Accordingly, "an [administrative] agency may not issue regulations covering an area in which it has no jurisdiction." *Kelley v. E.P.A.*, 15 F.3d 1100, 1105 (D.C. Cir. 1994) (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990)) (internal quotations omitted).

Moreover, the FCC cannot bootstrap its way around this problem based on § 2(a) of the Communications Act, 47 U.S.C. § 152(a). It is well-settled that the FCC traditionally has based its exercise of "ancillary" jurisdiction on § 2(a) of the Act ("The provisions of this act shall apply to all interstate and foreign communication by wire or radio . . ."). *See United States v.*

Southwestern Cable Co., 392 U.S. 157, 167-69, 171-73 (1968). The 1984 Cable Act, however, limited the reach of § 2(a) with respect to Title VI by adding the following language to § 2(a) of the Communications Act:

> The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, ***as provided in Title VI***.[11]

As this amendment makes clear, Congress deliberately chose to limit the Commission's § 2(a) authority over cable service to only that authority explicitly granted to the FCC in Title VI. In other words, the Commission cannot rely on § 2(a) to go beyond what is plainly provided for in the text of Title VI. In this instance, Sections 621(a)(1) and 635(a) are what is "provided in Title VI," and thus § 635(a) – and its requirement of resort to the courts, not the FCC – is what controls.

B. The Relevant Legislative Histories Indicate That Section 621(a)(1) Jurisdiction Rests With The Courts.

As stated in *A.C.L.U. v. F.C.C.*, "[o]nly where [the statutory] expression is genuinely ambiguous . . . is legislative history useful or necessary." 823 F.2d at 1568 (internal citations omitted); *see also Rodriguez v. United States*, 480 U.S. 522, 525 (1987) ("[if] the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'") (internal citations omitted); *Maine v. Thiboutot*, 448 U.S. 1, 6 n.4 (1980) ("Where the plain language . . . is as strong as it is here, ordinarily 'it is not *necessary* to look beyond the words of the statute.' ") (citations omitted) (emphasis in original). In an abundance of caution, however, we review the pertinent legislative history of the 1984 Act, which, *inter alia*, states: "*It is the Committee's intent that the franchise*

[11] 1984 Act, § 3(a)(1), 98 Stat. at 2801 (emphasis added).

process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."[12] We also review the relevant history of the 1992 Act. As a general matter, Congress' decision in § 635(a) to reserve to courts the exclusive authority to construe and enforce § 621(a)(1) is perfectly consistent with the Act's overriding goal of favoring *local*, community-based franchising to be responsive to *local* community cable-related needs. 47 U.S.C. § 521(2). Courts are much better suited than the FCC to resolve local franchise-specific, fact-specific disputes.

1. *The 1984 Act.*

The legislative history of the 1984 Act makes clear that Congress reserved authority over the franchising process, almost in its entirety, to LFAs, not to the Commission. *See, e.g., 1984 House Report* at 19 ("Primarily, cable television has been regulated at the local government level through the franchise process. . . . *[this legislation] establishes a national policy . . . . [t]his policy continues reliance on the local franchising process as the primary means of cable television regulation* . . ."") (emphasis added)); *id.* at 25 ("This legislation . . . continu[es] to provide the franchising authority with the ability to assure that renewal proposals are reasonable to meet community needs and interests . . . ."); *id.* at 26 ("Each local franchising authority may assess the cable operator a fee for the operator's use of public ways"); and *id.* at 26 ("H.R. 4103 explicitly grants [the power to require particular cable facilities and to enforce requirements in the franchise to provide those facilities] to the franchising authority"). Where Congress wished to delegate certain powers to the Commission, it expressly announced its intent to do so. *See,*

[12] H.R. Rep. No. 934, 98th Congress, 2d Sess. at 24, *reprinted in* 1984 U.S.C.C.A.N. 4655 ("*1984 House Report*") (emphasis added).

e.g., *id.* at 25 (" . . . municipal authority to regulate basic cable rates turns on whether a cable system faces effective competition in its market, as determined by the FCC").

The specific history of the original, 1984 version of § 621(a)(1) and other sections of the 1984 Act further affirms the primacy of LFAs in this area. *See id.* at 59 ("This provision grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area"). Delegation of authority to the Commission is notable in its absence. *See id.* at 72 (". . . the procedures and standards established by this section are available for the cable operator or the franchising authority to initiate if necessary"). Equally notable in its absence from the 1984 Cable Act legislative history is any mention of the FCC remaining in its pre-1984 business of regulating cable. Clearly, Congress was not contemplating FCC oversight or control of the regulatory scheme for granting franchises under § 621(a)(1). "In fact . . . the totality of the legislative history of the Act demonstrates with unusual clarity [what] was intended." *Rodriguez v. United States*, 480 U.S. at 525.

2. *The 1992 Act.*

Notwithstanding the clear and inextricable relationship between the 1992 amendments to § 621(a)(1) and § 635(a), the *NPRM* attempts to construe the 1992 amendments as an indication that "Congress considered the goal of greater cable competition to be sufficiently important *to justify the Commission's adoption of rules*." ¶ 15 (emphasis added). While it is true that the 1992 amendments exhibit Congress' intent to place limitations on LFAs' ability to refuse to grant additional competitive franchises, nothing in these amendments suggests that Congress contemplated that the FCC, rather than the courts, would have authority to implement or interpret that limitation; to the contrary, as we have seen, § 635(a) provides that courts, not the FCC, have

that authority. A review of the 1992 Cable Act's legislative history makes plain that the *NPRM*'s reading overreaches:

> Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be *encouraged* to award second franchises. Accordingly, [the 1992 Cable Act,] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.[13]

Section 621(a)(1), as revised, indicates a statutory prohibition against unreasonable refusals in the granting of franchises and merely encourages LFAs to award second franchises.

A searching review of the 1992 Act legislative history further reveals the contours of the intended congressional scheme for § 621(a)(1). As one federal district court noted:

> The House version contained a specific list of "reasonable" grounds for denial. H. R. Conf. Rep. No. 102-862, at 168-69 (1992). The Senate version, on the other hand, listed "technically infeasible" and left other reasonable grounds undefined. By choosing not to adopt a federally mandated list of reasonable grounds for denial in favor of an open-ended definition, *Congress intended to leave states with the power to determine the bases for granting or denying franchises, with the only caveat being that a denial must be "reasonable.*"

Knology, Inc. v. Insight Communications Co., L.P., 2001 WL 1750839 at * 2 (W.D. Ky. March 20, 2001) (citation omitted) (emphasis added).

As a fundamental policy matter, Congress in Title VI intended that cable operators be responsive to *local* community needs and interests, which is why the regulatory scheme charted by Title VI expresses a clear preference for local franchising, and for court (rather than FCC) review of franchising matters. Since facts and circumstances vary across communities, it made perfect sense for Congress to have given oversight authority for franchising disputes to the courts

[13] S. Rep. No. 92, 102d Cong., 1st Sess. at 47 (1991) *reprinted in* 1992 U.S.C.C.A.N. 1133 ("*1992 Senate Report*") (emphasis added).

rather than the FCC. Courts, unlike the FCC, are better suited to assess unique and differing factual situations that will inherently arise in § 621(a)(1) disputes. Put a little differently, the franchising process governed by § 621(a)(1) is peculiarly unsuited to the generalized "one-size-fits-all" prescriptions that FCC rules are designed to fill.

C. Contrary To The *NPRM*'s Suggestion, *City Of Chicago* Lends No Support To The Claim That FCC Has Section 621(a)(1) Jurisdiction.

The *NPRM* (at ¶ 15) cites *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), for the proposition that Congress' delegation to the Commission of authority to administer Title VI "necessarily includes the authority to interpret and implement Section 621." The *NPRM*, however, overlooks two critical distinctions that render *Chicago* inapposite.

First, *Chicago* is more appropriately characterized not as a § 621 case, but as a case construing the definitions set forth in § 602 of the Act. As a substantive matter, *Chicago* involved an appeal from a declaratory ruling in which the FCC held that an SMATV operator was not a "cable operator" of a "cable system" within the meaning of §§ 602(5) and 602(7), respectively, of the Communications Act. In other words, the case centered on dueling interpretations of these § 602 definitions and, on appeal, the court upheld the FCC's construction of those § 602 terms. *See City of Chicago*, 199 F.3d at 431-34 (upholding FCC determination that SMATV operator is not a "cable operator" of a "cable system" under §§ 602(5) and (7) and is thus exempt from franchise requirements). The only § 621 issue even arguably before the court in *Chicago* was one that no party to the case disputed: If the SMATV arrangement at issue involved a "cable operator" and a "cable system," a franchise was required under § 621(b)(1); if the arrangement did not encompass these definitions, it was undisputed that the § 621(b)(1) franchise requirement did not apply.

Second, and perhaps more importantly, *Chicago* was at most a § 621*(b)(1)* case, not a § 621*(a)(1)* case. *Chicago* involved a SMATV operator seeking an exemption from the franchise requirements of § 621(b)(1), which prohibits a "cable operator" from providing cable service without a franchise. The court merely noted that it was "not convinced that . . . the FCC has well-accepted authority under the Act but lacks authority to interpret [§ 621(b)(1)] and to determine what systems are exempt from franchising requirements." *City of Chicago,* 199 F.3d at 428. Since § 635(a) explicitly gives courts exclusive jurisdiction over § 621*(a)(1)* disputes but not § 621*(b)(1)* disputes, *Chicago* says nothing at all about the FCC's jurisdiction over § 621(a)(1). The case had nothing to do with § 621(a)(1)'s prohibition on unreasonable refusals to award additional competitive cable franchises.

D. The *NPRM* Erroneously Invokes Non-Title VI Sources Of Authority To Assert Section 621(a)(1) Jurisdiction.

It is difficult to ignore more than twenty years of regulatory history. *See A.C.L.U.*, 823 F.2d at 1567 n. 32 ("when an agency's assertion of power into new arenas is under attack, therefore, courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue"). The *NPRM* relies on what it characterizes as the broad purposes of § 621(a)(1) and the FCC's general authority under the Communications Act to claim that promoting greater cable competition justifies the FCC's adoption of rules to implement § 621(a)(1), as opposed to the court relief that Congress specifically provided in § 635(a). But "[n]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. at 525-26.

Although § 621(a)(1), and Title VI generally, reflect a legislative goal to promote greater cable competition, that alone does not mean that Congress intended the FCC, rather than the courts, to enforce that objective. In the case of § 621(a)(1), Congress made clear that it assigned the role of furthering § 621(a)(1)'s objective to the courts, not the FCC.

1. Section 1 and Section 4(i) Authority.

The *NPRM* tentatively concludes that the Commission's broad authority under §§ 1 and 4(i) of the Communication Act empowers the FCC to adopt rules to implement § 621(a)(1). ¶15. The FCC's general rulemaking authority under these provisions does not, however, provide it with authority beyond what the specific provisions of the balance of the Communications Act allow it to do.

As discussed above, not only are there no Title VI provisions that grant the FCC authority to construe or enforce § 621(a)(1); §§ 621(a)(1) and 635(a) specifically grant that authority to the courts, not the FCC. *See Motion Picture Ass'n of America, Inc., v. FCC*, 309 F.3d 796, 802-03 (D.C. Cir. 2002) (rejecting FCC's "very frail argument" that Sections 1 and 4(i) authorize the agency to adopt rules requiring video description; vacating agency rule adopted under general rulemaking authority). In this proceeding, as in *Motion Picture Ass'n of America*, "the FCC must find its authority in provisions other than [Section] 1." *Id.* at 804. Plainly stated, the FCC's general rulemaking powers do not empower it to do what specific provisions of Act cannot be read to permit:

> The FCC's position seems to be that the adoption of rules [implementing § 621(a)(1)] is permissible because Congress did not expressly foreclose the possibility. This is an entirely untenable position. *See Ry. Labor Executives* [*Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C.Cir.1994) (en banc)] ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the

> Constitution as well.") (emphasis in original). *See also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C.Cir.1995) ("We refuse . . . to presume a delegation of power merely because Congress has not expressly withheld such power.") . . . . Congress enacted [§ 621(a)(1) and § 635(a)] together. . . . [Congressional] silence surely cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the disputed regulations.

Motion Picture Ass'n of America, 309 F.3d at 805-06 (emphasis in original) (substituting references to §§ § 621(a)(1) and 635(a) for §§ 713 (a), (b) and 713 (f)).

The *NPRM* does not furnish any reasonable explanation as to why resort to the FCC's general rulemaking authority would on this occasion enable it to construe and enforce § 621(a)(1). To the contrary, because the texts of §§ 621(a)(1) and 635(a), when read together, unambiguously indicate Congress' strong preference for court, rather than FCC, enforcement of § 621(a)(1), the FCC's proposed action in this proceeding is even less justified than its overruled action in *Motion Picture Ass'n of America*.

2. Section 706 Authority.

The *NPRM* also asks (at ¶ 18) whether § 706 of the 1996 Act could empower the Commission to "take action" on concerns related to the franchise process. However, this is another impermissible attempt to bootstrap non-Title VI objectives into Title VI. As discussed above, Title VI clearly states its objectives and, absent a Congressional delegation of power over § 621(a)(1) (and there is none), the FCC is not authorized to adopt rules to implement § 621(a)(1). Moreover, as § 706(g) itself provides, nothing in § 706 "shall be construed to authorize the President to make any amendment to the rules and regulations of the Commission which the Commission would not be authorized by law to make[.]" In other words, the text of this non-Title VI section concedes that it cannot serve to empower the FCC to do what specific

provisions of the Communications Act cannot be read to permit. And since § 635(a) specifically prohibits the *NPRM*'s proposed reading, § 706 cannot save it.

For these reasons, the FCC does not have the legal authority to construe or enforce § 621(a)(1).

II. EVEN IF THE FCC HAD JURISDICTION, *CHEVRON* DEFERENCE WOULD NOT APPLY TO ITS CONSTRUCTION OF SECTION 621(a)(1).

Even if the Commission did have the statutory authority to adopt regulations to implement § 621(a)(1) (which it does not), § 635(a) makes plain that FCC jurisdiction would at best be only concurrent with the jurisdiction of the courts. *See, e.g., Kelley v. E.P.A.*, 15 F.3d at 1105; *Wagner Seed Co. v. Bush*, 946 F.2d 918, 920 (D.C. Cir. 1991). Where both the courts and the FCC share concurrent jurisdiction, the FCC's interpretations of the statute would therefore not be subject to the deferential standard of review articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "[E]ven if an agency enjoys authority to determine . . . a legal issue administratively, deference is withheld if a private party can bring the issue independently to federal court under a private right of action." *Kelley v. E.P.A.*, 15 F.3d at 1108.

Therefore, in light of Section 635(a), if the Commission were to adopt rules to implement Section 621(a)(1), its construction of those rules would be entitled to no deference by the courts. The private right of action guaranteed by Section 635(a) is evidence that Congress "intended that [a petitioner's] claim in such an event . . . be evaluated by the federal courts independent of [an agency's] institutional view." *Kelley v. E.P.A.*, 15 F.3d at 1109. Moreover, even if § 635(a)'s language creating the private right of action were ambiguous (and it is not), deference is still not required "because Congress has expressly established the Judiciary and not the [administrative

agency] as the adjudicator of private rights of action arising under the statute." *Adams Fruit Co.*, 494 U.S. at 649; *see also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (rejecting *Chevron* deference because statute was administered by the courts, not by agency). Thus, any rule adopted by the FCC in this proceeding would at best be viewed only as a policy statement "to guide [the Commission's] enforcement proceedings across the country"; it would not be binding on the courts or entitled to *Chevron* deference by the courts. *Kelley v. E.P.A.*, 15 F.3d at 1109.

The Commission, in light of the plain language of the statute, its legislative history, and the Commission's own historical interpretation, should reject the invitation in its *NPRM* to substitute its own policy judgments for those of Congress.

III. THERE IS NO CREDIBLE EVIDENCE THAT LFAs HAVE UNREASONABLY REFUSED TO GRANT COMPETITIVE FRANCHISES.

While, as noted above, we do not believe that the FCC has jurisdiction to adopt rules implementing or enforcing § 621(a)(1), we will nevertheless respond to some of the questions raised in Part III(A) of the *NPRM* to provide the Commission with information demonstrating what we believe to be clear: There is no evidence that § 621(a)(1) is not already serving its intended purposes, and thus the *NPRM* is a solution in search of a problem.

We focus here only on information that is more national in scope and that is available to us. By its nature, much of the information sought in Part III(A) is very fact-specific to each LFA. We anticipate that much of that LFA-specific information will be provided in comments filed by individual LFAs.

We caution the Commission, however, that any evidence adduced in this proceeding on the questions asked in Part III(A) of the *NPRM* will inherently be anecdotal, and especially in the

case of information provided by industry, one-sided, often anonymous, and untested by the fire of cross-examination and rebuttal.[14] LFAs do not have the resources of industry to participate in this proceeding in the way that industry will (both in comments and in *ex parte* visits to the Commission), and thus the record will almost certainly be not only anecdotal, but skewed. As a result, the record in this proceeding is unlikely to provide a reliable basis for the Commission to make sound and accurate policy judgments.

Subject to these rather substantial caveats, we respond as follows:

A. The Dearth of Precedent in the Fourteen Years Since Section 621(a)(1) Was Amended Strongly Indicates That There Is No Significant Problem Justifying FCC Action.

LFAs nationwide welcome competition and are eager to issue additional franchises to compete with incumbent cable operators. Given the inherently local nature of the franchising process, the evidence supporting this conclusion, far from being "anecdotal" (*NPRM* at ¶ 18), is rather comprehensive on a nationwide scale (the only scale that should be of any relevance to the FCC here).

The *NPRM* itself, for instance, recognizes the large number of competitive franchises that have been secured by Ameritech (a subsequent AT&T/SBC acquiree), SNET, BellSouth, Qwest, RCN, Verizon and NTCA members in the past decade or so. *Id.* at ¶ 8 & nn. 44-51. And that does not even include the many competitive franchises that LFAs have granted to others, such as

[14] In this regard, we note the FCC's ruling in *Ex Parte Presentations in Commission Proceedings*, GC Dkt. No. 95-21, Mem. Opin. & Order, 14 FCC Rcd. 18831 (1999), requiring that any local government named in the comments of a party must be served with a copy of those comments to provide the local government with an opportunity to oppose. It is particularly imperative that the Commission require commenters to adhere strictly to this requirement in this proceeding.

non-ILEC-affiliated providers like Grande and Wide Open West, as well as smaller, rural ILECs.[15]

The conclusion that LFAs have embraced the policy behind § 621(a)(1) is further supported by the remarkable dearth of reported precedent concerning § 621(a)(1) in general, and its "unreasonable refusal" provision in particular, in the nearly fourteen years since it was enacted. In fact, in that period, there have only been five reported cases that even involved claims that an LFA violated § 621(a)(1)'s "unreasonable refusal" provision, in only two of those cases was a violation found, and in neither did the LFA even deny the franchise application.[16] This leads to the inescapable conclusion that, aside from its legal jurisdiction defects, the *NPRM*'s proposal to adopt rules implementing § 621(a)(1) is a solution in search of a problem.

The *NPRM* also overlooks another crucial reason why LFAs will not unreasonably refuse to grant additional, competitive franchises. LFA franchising decisions are made by elected legislative bodies – city councils, county councils and commissions, and town councils. As such, LFAs are accountable, and must be responsive, to the desires of their electorates. And the Commission can rest assured that LFAs' constituents want competition in cable service. That is

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[15] *See, e.g.*, Comments of the National Cable and Telecommunications Association, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129 (filed Aug. 2, 2001); Debbie Narrod, *OVERBUILDERS: The New Generation*, CableFAX's CableWORLD, Nov. 27, 2000, *available at* http://www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=112700&file=overbuilders_new_generation.inc; K.C. Neel, *Deadend at the Headend?*, CableFAX's CableWORLD, Mar. 18, 2002, *available at* http://www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=031802&file=deadend_headend.inc.

[16] *See NEPSK, Inc. v. Town of Houlton*, 167 F.Supp. 2d 98 (D. Maine 2001), *aff'd*, 283 F.3d 1 (1st Cir. 2002) (holding that incumbent cable operator's response to a request for proposals is not an application for a second, competitive franchise); *Qwest Broadband Services v. City of Boulder*, 151 F.Supp. 2d 1236 (D. Colo. 2001) (holding city charter requiring voter approval of franchises violates § 621(a)(1)); *Knology, Inc. v. Insight Communications Co., L.P.*, 2001 WL 1750839 (W.D. Ky. March 20, 2001) (in a dispute between an incumbent and newly awarded franchise, the LFA's enactment of a local parity provision that permitted an incumbent to automatically stay the grant of additional franchises was an "unreasonabl[e] den[ial]" in violation of § 621(a)); *Classic Communications, Inc. v. Rural Telephone Service Co., Inc.*, 956 F.Supp. 896 (D. Kan. 1996) (cable operator alleges that LFA unreasonably refused to grant it a competitive franchise; court denies LFA's motion to dismiss without resolving on the merits whether refusal was unreasonable under § 621(a)(1)); *Liberty Cable v. City of New York*, 893 F.Supp. 191 (S.D.N.Y. 1995) (finding § 621(a)(1) claim not ripe because city had not acted on application yet), *aff'd*, 60 F.3d 961 (2d Cir. 1995).

a far more effective, and democratic, check on any unreasonable refusal to award competitive franchises than any FCC rules could ever provide.[17] And it is a check that is far more consistent with our nation's principles of democracy and federalism than a set of "one-size-fits-all" national rules promulgated by an unelected federal regulatory agency.

B. The Telecommunications Act Of 1996 Gave ILECs – and More Particularly, The RBOCs – Four Different Ways To Enter The Multichannel Video Market, Yet For Most Of The Past Ten Years, The RBOCs Have Done Little, If Anything, To Exploit That Opportunity.

A principal moving force behind the *NPRM* appears to be complaints made to the FCC by AT&T (formerly SBC), Verizon and other RBOCs about the supposed difficulties they claim to have encountered in the local franchising process in the course of their recently-announced plans to upgrade their telecommunications networks to provide (among other things) cable service in competition with incumbent cable operators.[18] While we welcome the RBOCs' somewhat belated interest in finally entering the cable market to compete with incumbent cable operators, the Commission should not be misled by their attempts to shift blame to LFAs for delays resulting from their own business decisions. Nor should LFAs or their residents be forced to bear the burden of sacrificing the local cable-related needs and interests protected by the local franchising process and the Cable Act in an effort to try to mitigate any potentially adverse consequences to the RBOCs resulting from their own business decisions.

A little history will prove the point. Prior to the 1996 Act, the RBOCs (and most other non-rural ILECs) were prohibited from entering the cable market by the telephone-cable

[17] *Cf. Charter Communications v. County of Santa Cruz*, 304 F.3d at 935 (9th Cir. 2002) ("methods exist to promote self-correction [of the local cable franchising process]: citizens can vote out their local representatives").

[18] *See, e.g., NPRM* at ¶¶ 5-6 & nn. 28-37. We note in passing that Consumers for Cable Choice, whose comments in MB Dkt No. 05-255 are cited in note 28 of the *NPRM*, is reportedly an organization largely backed by the RBOCs. *See* Linda Haugsted, *Telcos Feed 'Grassroots' Group*, 26 Multichannel News 18 (2005); David Lazarus, *Cable 'coalitions' sketchy*, San Francisco Chronicle, Nov. 2, 2005, at C-1; *RBOCs Attempt to Dupe Consumers with Faux 'Coalition*, Digital Straight Talk, posted Nov. 22, 2005, *available at* http://www.digitalstraighttalk.com/2005/11/rbocs_dupe_consumers_with_faux.shtml

crossownerhip prohibition formerly set forth in § 613(b) of the 1984 Act.[19] The 1996 Act repealed that crossownership prohibition and gave the RBOCs (and other ILECs) not one, but *four* different means to enter the multichannel video market.[20] The legislative history makes plain that Congress' expectation, and the professed intent of the RBOCs, was that this amendment would result in the RBOCs swiftly entering the multichannel video market and competing with incumbent cable operators.[21]

Yet, for eight or more of the nearly ten years since the 1996 Act was passed, the RBOCs, and especially AT&T and Verizon, made no serious effort to enter the multichannel video market as a cable operator, a video common carrier or an open video system operator.[22] And at least one RBOC, AT&T (in its former incarnation as SBC), not only did not pursue entry into the cable market, but in 2001**,** shortly after it acquired Ameritech, took affirmative steps to *exit* that market by selling off the local cable business in "75 communities" serving "more than 200,000 customers"[23] held by Ameritech.[24] This has been AT&T's consistent pattern: AT&T likewise

[19] 1984 Act, 98 Stat. at 2785 (codified at 47 U.S.C. § 533(b) (1984)).

[20] 47 U.S.C. § 651(a)(1)-(4) (common carriers may enter the video market as broadcast or wireless providers under Title III, as video common carriers under Title II, as cable operators under Title VI, or as an open video system provider under § 653).

[21] H.R. Confer. Report No. 458, 104th Cong., 2d Sess. at 171-72, *reprinted in* 1996 U.S.C.C.A.N. 124 ("New section 651 of the Communications Act specifically addresses the regulatory treatment of video programming services provided by telephone companies. Recognizing that there can be different strategies, services and technologies for entering video markets, the conferees agree to multiply entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice of services that best meet their information and entertainment needs").

[22] Their only discernible effort on this front was to begin to resell DBS service in some markets, and even that effort did not begin until around 2002 or 2003. Mike Farrell, *DirecTV, BellSouth Hook Up*, 24 Multichannel News 1 (2003); James E. Carroll, *Video: The Next Front in the Broadband War*, Converge! Network Digest, Sept. 9, 2003, *available at*, http://www.convergedigest.com/blueprints/ttp03/z1dynamics1.asp?ID=13&ctgy=; Vince Vittore, *BellSouth Samples Satellite with DirecTV Resale Setup*, Sept. 8, 2003, *available at* http://telephonyonline.com/ar/telecom_bellsouth_samples_satellite/.

[23] *See NPRM* at ¶ 8 & n. 45.

[24] Ted Hearn, *McCain, Powell Clash Over Rates*, Multichannel News, Jan. 20, 2003 at 3; SBC Communications, Inc., Form 10-K, at 8, Exh. 13 at 5, and Note 3 (Dec. 31, 2001).

jettisoned the video operations that it had previously acquired in its acquisition of Pacific Telesis, and had to be ordered by the Connecticut Department of Public Utilities not to abandon SNET's cable franchise for two years.[25]

Although RBOCs such as Verizon and AT&T were certainly free to make their own business decisions not to enter (or to exit) the cable market despite the invitation Congress gave them in the 1996 Act, they are not free – or at least certainly should not be free – to turn around and blame LFAs and the local franchising process for the consequences of their own business decisions to delay entry into (and in AT&T's case, to exit) the market. Yet that is precisely what they seek to do.[26] The Commission should not be deceived by the RBOCs' efforts to transform their own business decisions to sit on the sidelines of the cable market for nearly a decade into an excuse to reward those decisions with relief from the local franchising process that had nothing to do with those business decisions. Had the RBOCs done what they promised Congress they would do in securing repeal of the telephone-cable crossownership ban back in 1996, they would not be facing the supposed "catch-up" problem they face now.

C. A Franchise Is A Contract That The Cable Act Requires To Be Responsive To Local Cable-Related Community Needs And Interests, Not A Form Nationwide Contract, Which Is What The RBOCs Appear To Demand.

The *NPRM* (at ¶ 5) recounts industry allegations that the local franchising process "takes too long" and "involves outrageous demands by some LFAs" supposedly unrelated "to video

[25] *Fifth Annual Report In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC 98-335 at ¶ 115 (rel. Dec. 23, 1998); White Paper, *The Consumer Case Against the SBC-Ameritech Merger*, Consumers Union, Jan. 20, 1999 at § V, *available at* http://www.consumersunion.org/other/newsbc-amersw199.htm; Alan Breznick, *Ameritech Keeps Plugging into Video*, CableFAX's Cable WORLD, June 7, 1999, *available at* http://broadband-pbimedia.com/cgi/cw/show_mag.cgi?pub=cw&mon=060799&file=ameritech_keeps_plugging.inc.

[26] *See, e.g.*, Comments of Consumer for Cable Choice, BellSouth and Verizon in MB Dkt No. 05-255, cited in *NPRM* at nn. 28-33.

services or to the rationales for requiring franchises," and then (at ¶¶ 12-13) asks several questions directed at these allegations, as well as whether the cable franchising process should vary from locality to locality[27]

The short answer to the *NPRM*'s question, "should cable service requirements vary greatly from jurisdiction to jurisdiction?," is "yes." Indeed, not only should such requirements vary, the Cable Act decrees that they *must* vary, for the Act is built on the principle that cable systems must be "responsive to the needs and interests of the *local* community."[28]

The *NPRM*'s question (at ¶ 13) whether LFAs are "demanding concessions that are not relevant to providing cable services," and Verizon's allegations of the same (*id.* at ¶ 5 & n. 33) rest on an apparent misreading of the Cable Act. As an initial matter, Verizon's allegations about requirements unrelated to "video services" simply ignores that (1) the "cable service" definition is *not* limited to "video programming" or to the undefined concept of "video services," 47 U.S.C. § 522(6); and (2) the Cable Act makes equally clear that among the types of requirements that are "cable-related," and that LFAs are entitled by the Act to require, include in-kind institutional networks, 47 U.S.C. §§ 531(b), 541(b)(3)(D), & 544(b)(1) & (2)(A), something that we understand that Verizon has steadfastly refused to agree to provide in its negotiations with LFAs.

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[27] The *NPRM* also rather inexplicably asks what problems incumbent cable operators are encountering with the cable franchising, and whether current local franchising "procedures or requirements" are appropriate for incumbent cable operators. What this question possibly has to do with the issue at hand – § 621(a)(1) – the *NPRM* does not say. By its terms, § 621(a)(1) prohibits LFAs from "unreasonably refus[ing] to award an *additional competitive franchise*." (Emphasis added.) It is therefore inapplicable to incumbent cable operators that have already been awarded a franchise. *See NEPSK, Inc. v. Town of Houlton*, 167 F.Supp. at 102 (§ 621(a)(1) inapplicable to incumbent cable operator); *I-Star Communications v. City of East Cleveland*, 885 F.Supp. 1035, 1042 (N.D. Ohio 1995) (§ 621(a)(1) inapplicable to incumbent franchisee's complaint about possible franchise revocation). In the case of most incumbent cable operators, their future franchise terms are governed by the Cable Act's renewal provision, 47 U.S.C. § 546, but they are not in any way governed by the "unreasonable refusal" provision of § 621(a)(1).

[28] 47 U.S.C. § 521(2) (emphasis added). *See also* 47 U.S.C. § 546 (calls for ascertainment of "future cable-related community needs and interests" and an operator's renewal proposal is judged on, *inter alia*, its responsiveness to those needs and interests).

More generally, in asking whether LFAs are "demanding concessions" unrelated to cable service, the *NPRM* seems oblivious to the Cable Act, which makes clear – and has made clear since its original enactment in 1984 – that LFAs may not impose non-cable-related requirements in franchises.[29] In other words, Verizon is either (a) too narrowly construing the concept of "cable-related" needs, or (b) attempting to mislead the Commission based on franchising activities that occurred before the 1984 Cable Act was enacted and are no longer an issue. Either way, Verizon is simply wrong.

The RBOCs' complaint about how long it supposedly takes to obtain a franchise rests on mischaracterizations and willful balking at the locally-oriented nature of cable franchising that the Cable Act requires. AT&T (formerly SBC) certainly has no grounds to complain. As the Commission knows, it has taken the position that the multichannel video service component of its Project Lightspeed is not a "cable service," that it therefore is not subject to the franchise requirement of the § 621(a)(1), and thus needs no franchise at all.[30] As a result, AT&T has not deigned to see fit to even apply for a local cable franchise. Having arrogantly viewed itself as above the need for a local franchise, AT&T is in no position to complain about the length of the franchising process. It has never bothered to try.

Verizon, unlike AT&T, has sought franchises, albeit in only a fairly limited number of markets.[31] But in assessing allegations about delays in the franchising process, the Commission must keep two things in mind.

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[29] *E.g.*, 47 U.S.C. §§ 541(b)(3), 544(a), 544(b) & 546(c)(1)(D). *See also 1984 House Report* at 68-69.

[30] *See* SBC Ex Parte Filing, *IP-Enabled Services*, WC Docket No. 04-36 (filed Sept. 14, 2005). We vehemently disagree with AT&T's view.

[31] *See, e.g., Telco Video Franchises, Muni Networks Share Spotlight at NATOA Conference*, 71 Telecommunications Reports at 15 (Oct. 1, 2005); Dina ElBoghdady, *Verizon Pursues Local Cable Franchises*, Washington Post, July 19, 2005 at D-4; David P. Willis, *Taking on Cable*, Asbury Park Press, Oct. 2, 2005, *available at* http://www.app.com/apps/pbcs.dll/article?AID=/20051002/BUSINESS/510020365/1003/POLITICS.

First, a cable franchise is not a unilaterally-imposed instrument but a negotiated contract between the LFA and the cable operator.[32] As a result, any complaints by one party in bilateral negotiations about delays must be taken with a grain of salt, since any delay can just as easily be the fault of recalcitrance in that party's negotiating position as it is the recalcitrance of the other. Put a little differently, we have no doubt whatsoever that Verizon (and any other newcomer) would be able to obtain local franchises almost as quickly as it wants (and certainly faster than Verizon and AT&T have to date been able to provide cable service on a commercial basis in the markets they seek to enter) if the new provider were willing to agree to franchise terms comparable to those imposed on the incumbent cable operator.[33]

Thus, the issue is not whether LFAs are eager to grant a competitive franchise to new providers like the RBOCs; LFAs unquestionably are. The issue is how willing parties like Verizon are to agree to franchise terms that are, as the Cable Act requires, responsive to *local* community cable-related needs and interest.

Which brings us to the second point. The touchstone for a particular LFA's current local cable-related needs and interests is its franchise with the incumbent cable operator.[34] In most cases (unless the incumbent is itself in franchise renewal proceedings with the LFA), that will

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[32] *See, e.g.,* 1 C. Ferris & F. Lloyd, *Telecommunications Regulation* ¶ 13.14 [1] (through Release No. 46, Dec. 2005).

[33] By "comparable," we do not mean identical. There are certainly areas where a competitive franchise might differ from the incumbent operator's franchise. Depending on whether the new entrant is a small "overbuilder" or an ILEC, for instance, there may be reasons to impose different buildout requirements on the newcomer. There also may — again, depending on local facts and circumstances – be reasons to monetize PEG and I-Net obligations and transform them into a per-subscriber or gross revenue percentage arrangements. But with respect to some aspects of a franchise, there would seem to be no rational basis for distinguishing between the incumbent and the newcomer. Examples here would include the number of PEG channels, the franchise fee revenue base and percentage amount, and enforcement provisions.

[34] Again, this does not necessarily mean the newcomer's franchise must be the same as the incumbent's, *see* note 33, *supra*, but the incumbent's franchise certainly is the logical starting point for determining local cable-related community needs and interests.

mean that an LFA will look to the current incumbent's franchise as a measuring stick for the new entrant's franchise.

Verizon, on the other hand, appears to have a different starting point for negotiations. It instead wishes that each LFA would adopt Verizon's own "form" local franchise with as few modifications as possible, so that Verizon's franchises across the country can be as uniform as possible. While Verizon's preference is certainly understandable from its business point of view, what is *not* reasonable is for it to complain about delays in negotiating franchises while, at the same time, it insists in negotiations with LFAs that its franchise must be based on Verizon's national model rather than one that is based on the LFA's own particular local cable-related needs and interests, as the Cable Act requires. Verizon's complaints about supposed "delay" in the franchising process are thus, in many respects, really a complaint about the local community needs-based model of franchising that is one of the cornerstones of the Cable Act. 47 U.S.C. § 521(2). The FCC should not, and cannot, rewrite the Cable Act to suit industry's preferences.

IV. THE *NPRM*'S PROPOSED RULES ARE BEYOND THE FCC'S AUTHORITY TO ADOPT AND WOULD BE ARBITRARY AND CAPRICIOUS.

In Part III(C) of the *NPRM*, the Commission solicits comments on possible rules it might adopt concerning § 621(a)(1). As noted above in Part I, we do not believe that the FCC has jurisdiction to adopt rules implementing or construing § 621(a)(1) or to enforce § 621(a)(1), and that even if it did, any FCC interpretation of § 621(a)(1) would be entitled to no deference by the courts. The balance of our comments in this section is subject to that caveat.

A. Section 621(a)(1) Prohibits Only The Denial of A Competitive Franchise.

While admitting that § 621(a)(1) prohibits only the "unreasonable refus[al] to *award* an additional competitive franchise" (emphasis added), the *NPRM* nevertheless tentatively

concludes that the FCC is empowered to rewrite that language and expand the scope of § 621(a)(1) to reach the "establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, either by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks . . . ." *NPRM* at ¶ 19.

But that is *not* what § 621(a)(1) says. As courts have recognized, § 621(a)(1) requires that a franchise application must be *denied*.[35] Any doubt on this point is removed by the last sentence of § 621(a)(1):

> Any applicant whose application for a second franchise *has been denied by a final decision of the franchising authority may appeal such final decision* pursuant to the provisions of Section 635 for failure to comply with this subsection.

47 U.S.C. § 541(a)(1) (emphasis added).

Section 621(a)(1) simply cannot be construed to allow an applicant that is displeased with the progress of its application to bypass the last sentence of that provision and file a complaint in court or at the FCC challenging a *non-final* decision of an LFA. Such an interpretation would simply, and impermissibly, rewrite § 621(a)(1) to suit the FCC's policy preferences. Congress "does not . . . hide elephants in mouseholes." *Gonzales v. Oregon*, 126 S.Ct. 904, 921 (2006). It is ludicrous to suggest that Congress, having provided that only "final" decisions of the "denial" of a franchise application may be appealed, somehow intended, *sub silentio*, to have its own language gutted by allowing parties to bypass the last sentence of § 621(a)(1) entirely and go directly to the FCC. [36]

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[35] *I-Star*, 885 F.Supp. at 1042.

[36] The *NPRM* appears to be trying to attempt to construe § 621(a)(1) in a manner analogous to the way some courts have broadly construed 47 U.S.C. § 253(a)'s "may prohibit or have the effect of prohibiting" language, *see City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert denied*, 122 S.Ct. 809 (2002). But even assuming that § 253(a) can be fairly construed that broadly (and we do not think so), that is of no help to the FCC here, for

B. The *NPRM* Correctly Recognizes The Important Public Policy Goals Of Sections 621(a)(3), 621(a)(4)(A) And 621(a)(4)(B).

While we do not believe the Commission has jurisdiction over these matters, we wholeheartedly agree with the tentative conclusions reached in paragraph 20 of the *NPRM*. All three of the Cable Act provisions to which the *NPRM* refers – § 621(a)(3)'s requirement of assurance that access to cable service is not denied due to income, § 621(a)(4)(A)'s requirement that an operator be given "a reasonable period of time to become capable of providing cable services to all households in the franchise area," and § 621(a)(4)(B)'s requirement of adequate PEG capacity facilities and financial support – do indeed serve "important public policy goals."

We note, however, that the Cable Act assigns to LFAs, not the Commission, the responsibility of tailoring these requirements to the particular needs of each local community.

1. Franchise Buildout Requirements.

Of course, the § 621(a)(3) prohibition on red-lining and the § 621(a)(4)(A) requirement of a reasonable time to build out a cable system both relate to a matter of some contention between Verizon and AT&T, on the one hand, and some LFAs on the other. But those two provisions embody a conscious Cable Act policy of encouraging buildout of cable systems. And it is a policy that has served the nation well. It bears noting that cable modem service is the most widely available form of broadband available to Americans today, and local cable franchising had a hand in that: It was local franchise buildout requirements that required cable operators to build out their systems on a non-discriminatory basis throughout their franchise territories, a buildout that, when cable systems were subsequently upgraded to provide broadband, meant that cable's broadband services would reach the same wide areas that the cable franchise buildout

§ 253(a) on its face uses markedly different, and less specific, language than § 621(a)(1). These differences compel a different, and much narrower, construction of § 621(a)(1).

requirements had encouraged. It is more than a little ironic that it was the local cable franchising process, with community-by-community buildout requirements negotiated between LFAs and cable operators, that deployed broadband faster and more widely than state PUC (or FCC) regulation of telephone carriers.

RBOC opponents of franchise buildout requirements have also mischaracterized the nature of those requirements. While they do (and should) vary from community to community based on such factors as geographic size, topography, household density, and neighborhood dispersion, franchise buildout requirements typically have two critical features that are designed to make buildout as widespread as possible while, at the same time, accommodating economic constraints faced by the cable operator.

First, local franchise buildout requirements typically have a household density limitation. That is, absent a financial contribution by those requesting service in aid of construction, the operator is not required to build out its system to areas that have a household density below a certain threshold level. The threshold level varies from community-to-community. Over time, it also has tended to become lower as potential revenues per subscriber have grown, making progressively lower density levels more financially feasible to build.

Second, local franchise requirements also invariably provide the operator with a time period to complete building out its system in the franchise area. The period is almost always a negotiated one between the LFA and the cable operator, and of course will vary depending on the size of the area to be served, as well as other characteristics. (The larger the area to be constructed, of course, the more time the franchise will allow for the operator to build out its system.)

When properly understood, franchise buildout requirements are not "barriers to entry" at all.[37] To the contrary, they should be a problem for the RBOCs only if the RBOCs' business plans are to provide new service only to selected demographic neighborhoods of a community, leaving less lucrative neighborhoods in the community only with a lesser, second-class form of service, or no service at all.[38] But if that is indeed the business plan, then local franchise buildout requirements will be essential if the goals Congress set forth in §§ 621(a)(3) and 621(a)(4)(A) are to be protected.

2. Franchise PEG and I-Net Requirements.

Public, educational and governmental ("PEG") access channel capacity, facilities and equipment requirements, along with institutional network ("I-Net") requirements, are among the most vital elements of the local community cable-related needs and interests that the Cable Act was designed to preserve and protect. Because they are based on each community's own unique local needs, PEG and I-Net requirements vary considerably from community to community. And that is precisely what Congress intended. *See* pp. 12-13 *supra*. PEG and I-Net facilities and equipment requirements come in many forms – sometimes they are in-kind, sometimes they are monetary, and sometimes they are a mix of both. Monetary PEG and I-Net obligations also vary; they can be in lump sum form, in periodic lump sum payment form, some sort of variable cost form (typically per-subscriber or a percentage of gross revenues), or some combination of both.

Because PEG and I-Net franchise obligations are reflective of local community needs, a competitive franchise applicant should also be required to serve those same needs, and in a

[37] *NPRM* at ¶ 23. That ILEC service areas do not coincide perfectly with LFA jurisdictional boundaries is a red herring. The number of places where that is true is not significant at all. And even where that occurs, there is no evidence that LFAs are in the habit of insisting that ILECs build out areas outside their local telephone service areas. The issue has been raised by industry to divert attention from the real issue. Should ILECs be required to offer cable service in the same areas they offer telephone service? We think the answer should be "yes."

[38] As the *NPRM* notes, it appears that is the plan of AT&T. *See NPRM* at ¶ 6 & nn. 36-37.

manner comparable to the incumbent operator.[39] What constitutes "comparable" will vary because each community's needs vary, and thus generalizations are difficult to make. These matters are therefore particularly unsuited to any "one-size-fits-all" solution. The FCC's only role, if any, should be to make clear that *all* cable operators, whether incumbent or not, have an obligation to meet, on a fair and equitable basis, the PEG and I-Net needs of each LFA area they serve.

C. The FCC Has No Authority To Adopt Rules Or Best Practices Concerning Section 621(a)(1).

The *NPRM*'s suggestion (at ¶ 21) that the Commission might adopt rules or "best practices" guidelines under § 621(a)(1) is misguided, as a matter of both law and policy. Congress deliberately assigned the FCC a very limited role under Title VI, giving primacy instead to the role of LFAs.[40] Title VI certainly cannot plausibly be construed to grant the FCC authority to become a sort of national franchising authority or national LFA oversight board, either generally or, particularly, in the case of local franchising decisions under § 621(a)(1).[41] Yet that is precisely, and improperly, what adoption of Commission rules or "best practices" with respect to § 621(a)(1) would be.

Setting a "maximum timeframe" within which an LFA must act on a competitive franchise application (*NPRM* at ¶ 21) is wrong-headed. As an initial matter, the *NPRM*'s reference (at n.80) to the 120-day deadline for LFAs to act on franchise transfer applications under § 617, 47 U.S.C. § 537, actually confirms that the FCC has no authority to set such a deadline in the case of § 621(a)(1). In stark contrast to what it did in § 621(a)(1), Congress set a

[39] *See* note 33 *supra*.
[40] *See* pp. 10-15 *supra.*
[41] *Id.* We are aware, of course, that legislation has been introduced in Congress that would transform the FCC into a sort of national franchising authority for broadband video service providers. While we philosophically disagree with those legislative proposals, they prove our point: The drastic rewriting of the Communications Act required to do what the *NPRM* proposes is the job of Congress, not an unelected FCC.

specific statutory deadline in § 617 and then went on to grant the FCC authority to prescribe regulations implementing that deadline, 47 U.S.C. § 537.

In the case of § 621(a)(1), of course, Congress did neither, and instead prescribed, in both § 621(a)(1) and § 635(a), that relief for violations of § 621(a)(1) must be sought in the courts, not from the FCC. Yet if, as the *NPRM* suggests, the FCC can rewrite § 621(a)(1) to make it read like § 617, then the words of § 621(a)(1), and of § 617, would have no meaning at all.

Furthermore, even if the FCC could prescribe a deadline under § 621(a)(1) (which it cannot), it would be bad policy. If an applicant knows that its franchise will be "deemed granted" within a set number of days, it has little or no incentive to bargain in good faith with an LFA. On the contrary, it will have an increased incentive to stonewall.

Moreover, a deadline to act and a "deemed granted" effect of inaction also would provide franchise applicants with an affirmative incentive to delay applying for the required local franchise until the last minute. This is because in most cases, due to state and local law public notice and hearing requirements for LFA action, the applicant will know that it will be impossible for the LFA to act within the prescribed FCC deadlines. In these circumstances, it might be in the applicant's interest to delay any local application until the last minute, knowing that the result is likely to be a "deemed granted" approval.

A prescribed deadline for action also would create perverse incentives for LFAs. Rather than encouraging LFAs to work with franchise applicants in reaching a mutually acceptable franchise agreement, a deadline and "deemed granted" proposal would encourage LFAs to act quickly and either deny a provider's franchise application or unilaterally grant it on terms that the applicant is unwilling to accept. The reason is obvious: Facing a deadline and a headstrong applicant in franchise negotiations, the *only* way that an LFA could preserve *any* ability to

exercise its Cable Act-protected authority to ensure that a cable operator meets local community needs and interests would be either to deny the application or grant it in the LFA's unilaterally imposed terms.

Only by acting precipitously on the application in this way could the LFA avoid the "deemed granted" effect of failing to act before the deadline lapsed. While any such denial or unilateral grant would of course be subject to challenge by the applicant before a court under § 621(a)(1), such litigation would at least still hold out the possibility of preserving the LFA's ability to protect local cable-related community needs and interests.

It is therefore difficult to see how a mandatory deadline that would encourage greater confrontation and litigation between LFAs and franchise applicants could serve the Commission's goal of promoting competitive franchises. Rather, a mandatory deadline would likely bog LFAs and franchise applicants down in more litigation. The result would be the worst of all possible worlds: possible frustration of both § 621(a)(1)'s pro-competitve objectives and, at the same time, the Cable Act's touchstone that franchises be tailored to meet *local* cable-related need and interests.

D. That A Franchise Applicant May Already Be In The Rights-Of-Way Does Not Change The Cable Act Requirement That A Cable Operator Must Satisfy Local Cable-Related Needs And Interests.

The *NPRM* (at ¶ 22) questions how what it claims is the "primary justification for a cable franchise" – an LFA's "need to regulate and receive compensation for the use of public rights-of-way" – "applies" in the case of franchise applicants, such as ILECs, that are already authorized to use those rights-of-way ("ROW") to provide telephone service. This question reflects a disturbingly flawed and crabbed understanding of the public obligations embodied in local cable franchising that the Cable Act preserves.

To be sure, the fact that a competitive franchise applicant is also the local ILEC will have an effect on the local franchising process. In the case of a local ILEC applicant, for instance, inquiry into the applicant's financial, technical and legal qualifications can usually be dispensed with. Similarly, in those local jurisdictions where ROW management requirements are imposed through generally applicable ordinances, rather than through individual franchise agreements (which is not true in all communities), ROW management issues in a cable franchise agreement with the local ILECs may also be truncated.

But an applicant's status as a local ILEC would have little or no affect on other aspects of cable franchising. PEG and I-Net requirements, for example, would be unaffected. The same would be true of franchise fee requirements, customer service standards, buildout requirements and police power requirements. In the case of buildout requirements, an applicant's ILEC status may in fact mean that such requirements are more justified, and less of a supposed "barrier to entry" (*NPRM* at ¶ 23), than in the case of a competitive franchise applicant with no pre-existing facilities in the LFA's jurisdiction and with far less financial wherewithal than an ILEC. For a small applicant with no pre-existing facilities, a jurisdiction-wide buildout requirement may indeed make entry more difficult in some large jurisdictions. In the case of an ILEC, however, it is difficult to see what policy would be served by allowing the ILEC to do with cable service what it cannot do with telephone service: selectively and discriminatorily favor some of its existing customer base over others.

PEG, I-Net, franchise fee, buildout, and customer service requirements are, in an economic sense, a form of compensation for use of the ROW to provide cable service, as opposed to use of the ROW to provide other kinds of utility services (to which, of course, different social obligations may attach). And they are requirements that the Cable Act has

decreed are necessary if a cable system is to be truly responsive to *local* community needs and interests. This structure ensures that at least one form of local media is in fact locally-responsive in what has become an era of increasingly consolidated, "cookie-cutter" national media. That, we submit, is a very valuable public benefit that the Cable Act rightly, and as it turns out, presciently preserves.

CONCLUSION

For the foregoing reasons, the Commission should not adopt any rules or guidelines to implement or enforce § 621(a)(1).

Respectfully submitted,

/s/ Tillman L. Lay

James N. Horwood
Tillman L. Lay
Ruben D. Gomez
SPIEGEL & MCDIARMID
1333 New Hampshire Avenue, N.W.
Second Floor
Washington, D.C. 20036
(202) 879-4000

Counsel for NATOA et al.

February 13, 2006

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable	)	
Communications Policy Act of 1984 as amended	)	MB Docket No. 05-311
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	
	)	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE U.S. CONFERENCE OF MAYORS, THE ALLIANCE FOR COMMUNITY MEDIA, AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY

James N. Horwood
Tillman L. Lay
Ruben D. Gomez
SPIEGEL & MCDIARMID
1333 New Hampshire Avenue, N.W.
Second Floor
Washington, D.C. 20036
(202) 879-4000

Counsel for NATOA et al.

Dated: March 28, 2006

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SUMMARY

Like our opening comments, the majority of opening comments supported the local franchising process as it is, and opposed any preemptory FCC rules concerning § 621(a)(1) of the Cable Act. The telephone industry and its allied commenters took a dramatically different view, urging the Commission to use § 621(a)(1) as a springboard for rewriting the Cable Act by adopting a series of rules that would preempt the ability of LFAs to perform the responsibilities that the Cable Act preserves to them. Telephone industry commenters fail, however, to provide any convincing factual predicate for the unprecedented actions they propose. Industry resorts to anonymous anecdotes and recirculated second and third-hand press accounts. Given the anonymous nature and limited number of anecdotes relative to the number of LFAs nationwide, however, the record indicates a decided *lack* of any widespread problem justifying any FCC action.

The Commission cannot rewrite Congress' language to suit the telephone industry's, or even the Commission's, policy preferences. Not a single telephone industry commenter addressed the inextricable link between §§ 635(a) and 621(a)(1) contained in the 1992 amendments that assigns of review of § 621(a)(1) disputes to the courts, not the FCC. The FCC cannot assert its ancillary jurisdiction in a manner that would conflict with specific provisions in its governing statute -- in particular, §§ 621(a)(1) and 635(a). Section 706 of the 1996 Act cannot plausibly be read as empowering the FCC to amend or repeal any provision of Title VI, and the Commission has already ruled that § 706 is not an independent source of Commission authority. Similarly § 4(i) only authorizes FCC action that is "not inconsistent with this Act," and assertion of authority over § 621(a)(1) would be inconsistent with the Act -- specifically § 635(a).

Verizon's First Amendment argument is a facial challenge to the Cable Act itself, a challenge that the Commission is powerless to entertain. The reasonableness of the kinds of franchise requirements attacked by Verizon must be evaluated as they are applied in specific factual contexts. These factual contexts will vary from LFA to LFA.

Even if one were to assume that the FCC has authority to adopt rules concerning § 621(a)(1) (which it does not), the series of preemptive rules proposed by the telephone industry and its allies, are in most cases flatly inconsistent with the Cable Act.

Virtually all proponents of § 621(a)(1) rules urge the Commission to set time limits on LFA franchising decisions. These deadline proposals cannot be squared with the Cable Act and would improperly transform the FCC into a national franchising authority. The initial franchising process is quite different from the franchise transfer process, and contrary to some ILECs' assertions, those differences mean that the initial franchising process will, and should, inherently be longer (or at least more variable) than the franchise transfer process. The terms of the new entrant's franchise cannot be the ones that the applicant unilaterally proposes, because that would allow the applicant to dictate unilaterally its own franchise terms, directly contrary to the Cable Act's requirement that cable franchises must be responsive to local needs and interests as determined by the LFA. Nor could the FCC dictate the terms of the applicant's new franchise without effectively becoming the LFA, in direct contravention of the Cable Act. Section 621(a)(1) clearly allows a *reasonable* refusal, but under the ILECs' deadline proposals, there would be none: Once the deadline passes, the LFA could not "refuse" at all, no matter how unreasonable the applicant's proposal in light of community needs, or how unreasonable or recalcitrant the applicant has been in negotiations with the LFA.

ILECs and their allies urge the Commission to adopt rules prohibiting LFAs from imposing buildout requirements on competitive franchise applicants. But they mischaracterize the nature of franchise buildout requirements, which contain density limitations and also provide a reasonable time for system buildout. Telephone industry commenters and their allies also cannot escape the plain language of § 621(a)(4)(A). That provision certainly cannot be read to mean that even if an LFA gives a provider a "reasonable period to time" to do so, the LFA can nevertheless be *forbidden* from requiring an operator to "provid[e] cable service to *all* households in the franchise area." Yet that is precisely what Verizon and its allies improperly urge the Commission to do. Nor can a provider define its own franchise area." If a provider could self-define its franchise area, that would undermine the entire local franchising process envisioned by the Cable Act.

Telephone industry commenters' launch a range of misguided and unwarranted attacks on cable franchise fee, PEG access, and I-Net requirements. Proponents of franchise fee rules, however, have not shown any widespread LFA abuse, nor any problem that courts are not perfectly capable of handling.

Some telephone industry commenters urge the FCC to declare that PEG in-kind and monetary grant obligations over and above the 5% franchise fees are not permissible. But the Commission cannot do that, for any such ruling would be contrary to the Cable Act. In-kind facilities or services are not a "tax, fee, or assessment of any kind" within the meaning of § 622(g)(1). With respect to monetary payments to support PEG, Section 622(g)(2)(C) specifically exempts from the "franchise fee" definition "capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities."

Telephone industry commenters' attacks on I-Net obligations are misguided. The claim that I-Nets are somehow limited to video service flies in the face of the statute, which defines I-Nets to encompass non-video services, such as data transmission and telecommunications. I-Nets are used by LFAs for a variety of non-video applications, such as data and voice communications, and those I-Nets perform vital public safety and homeland security communications functions. That is a capability that LFAs and, indeed, local residents and our nation, cannot afford to lose in these dangerous times.

Some RBOCs urge the Commission to adopt rules prohibiting an LFA's ability to assess a franchise application fee, acceptance fee, and LFA application processing cost reimbursement requirements over and above the 5% franchise fee. But § 622(g)(2)(D) refers to "requirements or charges *incidental to the awarding or enforcing* of the franchise," not to requirements or charges *"incidental" in amount*. Obtaining a mortgage, for instance, is typically "incidental to" buying a house, but the mortgage is not necessarily (or even usually) "incidental" in amount. The other "charges or requirements" listed as examples in § 622(g)(2)(D) -- "bonds, security bonds, letters of credit, insurance, indemnification, penalties, or liquidated damages" -- cannot plausibly be construed to be invariably incidental in amount. The amount of application fees and cost reimbursement depends on a variety of factors, not the least of which is how cooperative, or recalcitrant, the applicant is in the franchise application and negotiation process.

The RBOCs argue that their upgraded broadband systems are not "cable systems" within the meaning of § 602(7). But to the extent that a common carrier facility is used to provide cable services, it is *both* a cable system *and* a common carrier facility, and the "cable system" component of the facility includes the facility's "set of closed transmission paths" -- *i.e.,* its physical wires and cable. This does not result in the supposed problems or "barriers" about

which the RBOCs complain. There is no credible evidence that LFAs are in any way hampering RBOC network upgrades by demanding a cable franchise before any network upgrade activity can commence.

Telephone industry commenters and their allies urge the Commission to preempt so-called "level playing field" requirements. Because only courts, not the FCC, can construe and enforce § 621(a)(1)'s "unreasonable refusal" requirement, § 621(a)(1) furnishes the Commission with no authority to preempt state level playing field laws. Moreover, there is little or no evidence to suggest that state level playing field laws have had any adverse effect on the granting of competitive franchises. Further, to the extent that opponents of level playing field requirements mean to suggest that the FCC can or should untether the terms of competitive franchises from those of the incumbent's cable franchise, they are wrong. A competitor's franchise should be comparable to the incumbent's in terms of meeting local cable-related needs and interests such as PEG capacity and support, I-Nets and similar requirements. The touchstone of the Cable Act is that a cable system must be responsive to *local* community cable-related needs and interests, *not* cookie-cutter, federally-determined needs and interests. While that does not mean that a competitive franchise must or should be identical to the incumbent's, it does mean that the competitive franchise should be comparable to the incumbent's in terms of its responsiveness to local cable-related needs and interests.

Congress gave § 621(a)(1) disputes to the courts rather than the FCC for a very good reason: Such disputes are inherently fact-specific, and thus are ones that the courts are particularly well-suited to handle, and that the FCC is particularly ill-equipped to handle.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
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Implementation of Section 621(a)(1) of the Cable	)	
Communications Policy Act of 1984 as amended	)	MB Docket No. 05-311
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REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE U.S. CONFERENCE OF MAYORS, THE ALLIANCE FOR COMMUNITY MEDIA, AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY

The National Association of Telecommunications Officers and Advisors ("NATOA"), the National League Of Cities ("NLC"), the National Association of Counties ("NACO"), the U.S. Conference of Mayors ("USCM"), the Alliance for Community Media ("ACM"), and the Alliance For Communications Democracy ("ACD"), submit these reply comments in response to opening comments filed to the Notice of Proposed Rulemaking, released November 18, 2005, in the above-captioned proceeding ("*NPRM*").

INTRODUCTION

Like our opening comments, the majority of opening comments supported the local franchising process as it is, and opposed any preemptory FCC rules concerning § 621(a)(1) of the Cable Act. Of nearly 4,000 opening comments, most, including the comments by local franchising authorities ("LFAs"), public, educational and governmental ("PEG") access

organizations and users, and many members of the public, took that position. So did the cable industry.[1] And at least one competitive, or "overbuild," cable operator did as well.[2]

As expected, the telephone industry and its allied commenters took a dramatically different view. They urge the Commission to use § 621(a)(1) as a springboard for completely rewriting the Cable Act by adopting a series of onerous rules that would radically preempt the ability of LFAs to perform the responsibilities that the Cable Act preserves to them.[3]

Telephone industry proponents of these drastic rules, however, woefully fail to provide any convincing factual predicate for the unprecedented Commission actions they propose. Ignoring the *NPRM*'s explicit directive (at ¶ 13) that industry present "specific examples" and "empirical data" of supposed LFA abuse, industry instead resorts primarily to anonymous anecdotes and recirculated second and third-hand press accounts[4] -- anecdotes and accounts that are one-sided and subject to no corroboration and which therefore would inherently be a faulty basis from which any reliable conclusions could be drawn.[5] Indeed, given the anonymous nature and limited number of industry's anecdotes relative to the number of LFAs nationwide, the record indicates a decided *lack* of any widespread problem justifying any FCC action. Likewise, although industry searches far and wide in the Communications Act for a legal basis for the FCC rules they propose,[6] they seem completely unaware of § 635(a), which clearly and

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[1] *See, e.g.*, NCTA Comments at 2, 5, 11, 19; Cablevision Comments at 6-7; Comcast Comments at 2-3, 12, 26; Charter Comments at 4, 8, 12.

[2] RCN Comments at 2, 6, 8.

[3] *See generally* Verizon Comments; AT&T Comments; BellSouth Comments; Qwest Comments; USTA Comments; FTTH Council Comments; BSPA Comments; Cincinnati Bell Comments; Consumers for Cable Choice Comments.

[4] Verizon Comments at 32-35, 41, 54, 59-60, 62-66, 72-73, 75-76; AT&T Comments at 24-26, 52-53; BellSouth Comments at 36, 38, 41-42; Qwest Comments at 9, 13-14.

[5] To the limited extent that telephone industry commenters do actually identify particular LFAs, reply comments being filed on behalf of several groups of LFAs address many of these accounts and show them to be exaggerated, distorted, or simply wrong.

[6] *See* Verizon Comments at 21-27; AT&T Comments at 32-42; BellSouth Comments at 48-67; Qwest Comments at 14-20.

unambiguously answers the legal question: Authority over § 621(a)(1) lies with the courts, not the Commission.[7]

But aside from these and many other legal and factual infirmities in industry's position, telephone industry proposals for new § 621(a)(1) rules rest on a fundamentally flawed premise. To its credit, AT&T is at least candid about the matter, saying that the need for § 621(a)(1) rules "does *not* rest on evidence that many . . . LFAs have in the past imposed anticompetitive barriers to entry and failed to allow competitive entry as quickly and effectively as possible or on predictions that LFAs will intentionally abuse the franchising process in the future."[8] Rather, in AT&T's view, the radical new § 621(a)(1) rules it and its allies propose would be needed even if "each of the nation's thousands of LFAs could be expected to act as quickly and reasonably as state and local laws allow."[9]

In other words, the telephone industry's position is that, due to technological change, the FCC must construe § 621(a)(1) -- which forbids only "unreasonable" refusals to award an additional competitive franchise -- also to reach and preempt even "quick and reasonable" LFA decisions because, again according to AT&T, marketplace changes mean franchising decisions can no longer be "left in the hands of" LFAs.

But this the Commission cannot do. The Cable Act leaves these decisions "in the hands of" LFAs and, where disputes arise, to the courts.[10] The Commission cannot rewrite Congress' language to suit the telephone industry's, or even the Commission's, policy preferences.[11] While

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[7] NATOA *et al.* Comments at 4-20. *See also* NCTA Comments at 19-28.
[8] AT&T Comments at 2 (emphasis added).
[9] *Id.*
[10] *E.g.* NATOA *et al.* Comments at 4-20.
[11] *See NPRM*, Statement of Comm'r Jonathan S. Adelstein, at p. 25 ("The Commission needs to tread with caution and care before it asserts any authority to interpose itself with LFAs to the extent Congress specifically delegated power to local officials. ... We should not and indeed cannot usurp for ourselves the authority granted by Congress to local governments. ... Even if the Commission were to agree from a policy perspective that the franchising . . . (continued)

we disagree with industry's policy preferences, resolution of disagreements over policy preferences such as these -- which really are what the telephone industry and its allies' massive filings are all about (although others are not so forthright about it as AT&T) -- are for Congress, not the Commission. Section 621(a)(1) simply cannot be read to empower the Commission to adopt rules preempting and supplanting the LFA franchising process, regardless of how "quick and reasonable" an LFA may be, to achieve some preferred policy objective.

Stripped of this misdirected policy preference rhetoric, industry's arguments for preemptive § 621(a)(1) action wither, as we now show.

I. NO PARTY IS ABLE TO DISPUTE WHAT § 635(a) PLAINLY SAYS: CONGRESS GAVE THE COURTS, NOT THE FCC, JURISDICTION OVER § 621(a)(1) DISPUTES.

Several commenters agreed with the position in our comments that the prospect of the FCC adopting rules to implement or enforce § 621(a)(1) exceeds the Commission's legal authority under the Communications Act.[12] Telephone industry commenters, in contrast, advanced little or no legal justification for the position that the FCC has legal authority to assert § 621(a)(1) jurisdiction. Moreover, not a single telephone industry commenter addressed the

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(Continued). . .
process is cumbersome and unwieldy, as competitors argue passionately, those arguments are better made before Congress, not the Commission. The franchising process and local powers are spelled out clearly in statute, and only Congress can provide such relief.").

[12] *See, e.g.*, NCTA Comments at 19-29; Comcast Comments at 26-39; Cablevision Comments at 5-8; VCTA Comments at 6-8; Comments of Michigan Municipal League, Michigan Townships Association, Michigan Coalition to Protect Public Rights-Of-Way and Michigan-National Association of Telecommunications Officers and Advisors ("Michigan Coalition") at 3-28; Comments of Anne Arundel County, Carroll County, Charles County, Howard County, and Montgomery County ("Maryland Counties") at 30-38; Initial Comments of the Burnsville/Eagan Telecommunications Commission, the City of Minneapolis, Minnesota, the North Metro Telecommunications Commission, the North Suburban Communications Commission, and the South Washington County Telecommunications Commission at 27-38; Comments of Ada Township, Allendale Charter Township, City of Cadillac, Holland Township, City of Hudsonville, Huron Charter Township, City of Livonia, Milton Township, City of Southfield, City of Swartz Creek, Vienna Charter Township, City of Warren, City of Westland, Whitewater Township, Zeeland Township and the Pennsylvania State Association of Boroughs ("Pennsylvania and Michigan Municipalities") at 4-7.

inextricable link between §§ 635(a) and 621(a)(1) contained in the 1992 amendments and Congress' explicit assignment of review of § 621(a)(1) disputes to the courts, not the FCC.

A. The Authorities Cited by the Telephone Industry Commenters Do Not Support Their Claim that the FCC Can Rely on its Plenary Rulemaking Authority to Implement Provisions of § 621(a)(1).

Verizon, AT&T, BellSouth and the USTA assert that *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), and *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), support the *NPRM's* tentative conclusion that the Commission has legal authority to adopt rules to interpret, implement and enforce § 621(a)(1). We disagree.

As an initial matter, the telephone industry comments fail to read *Iowa Utils. Bd.* properly.[13] In fact, when properly read, *Iowa Utils. Bd.* further bolsters our position, not the telephone industry's. The issue in that Title II case was whether the authority given to the FCC by § 201(b)[14] extended with equal force to the Title II amendments to the Communications Act made by the Telecommunications Act of 1996. The answer turned on the "question [of] whether the state commissions' participation in the administration of the new [post-1996 Act] *federal* regime [for carrying out the provisions of §§ 251 and 252 was] to be guided by federal-agency regulations." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6 (emphasis in original). FCC jurisdiction over the underlying Title II provisions (§§ 251 and 252) in dispute in *Iowa Utils. Bd.* is perfectly consistent with our views on FCC jurisdiction in this proceeding. The Court held, *inter alia,* that the FCC's ancillary jurisdiction "*could* exist" even where the Act does not expressly authorize the FCC to assert its jurisdiction. *Iowa Utils. Bd.*, 525 U.S. at 380. It is this holding

[13] *See, e.g.,* Verizon Comments at 22, 25; AT&T Comments at 34; BellSouth Comments at 56; USTA Comments, at 16 n.39.

[14] Section 201(b) provides that "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b).

that telephone industry commenters wish to characterize as applicable in the instant proceeding. In doing so, however, they sidestep the real issue, because what we challenge is not the existence of the Commission's ancillary jurisdiction, but the *NPRM*'s suggestion that the FCC might attempt to assert its ancillary jurisdiction in a manner that would conflict with specific provisions in its governing statute -- in particular, §§ 621(a)(1) and 635(a).

Iowa Utils. Bd. is instructive in this respect. In reaching its holding, the Court acknowledged the "need for both limitations" on statutory construction (referring to the need for limits on substantive reach of statute as well as on FCC's ancillary authority). *See Iowa Utils. Bd.*, 525 U.S. at 380-81. It did this in the context of a case "involv[ing the FCC's] attempt to regulate services over which it *has* explicitly been given rulemaking authority." *Iowa Utils. Bd.*, at 382 n.7 (emphasis in original). Cast in this light, the question that the *NPRM* should be asking is whether the proposed exercise of the FCC's ancillary authority over 621(a)(1) exceeds the authority granted to the FCC by the Act. In *Iowa Utils. Bd.*, the answer to that question with respect to the Title II provisions at issue was an unequivocal, "no." Here, in contrast, the answer with respect to the Title VI provisions at issue (§§ 621(a)(1) & 635(a)), is an equally unambiguous, "yes."

Iowa Utils. Bd. did not hold that the expansive reach of § 201(b) gave the FCC authority to adopt rules and regulations under Title VI, much less rules and regulations inconsistent with the Act itself. Accordingly, there simply is no basis whatsoever here -- either within the four corners of the Communications Act or the cases cited by the telephone industry commenters -- to conclude, as AT&T contends (at 34), that "the Commission's § 201(b) authority to issue regulations extends to *all* amendments to the Communications Act" (emphasis in original), when § 635(a) specifically says otherwise with respect to § 621(a)(1). The driving principle common

to *Iowa Utils. Bd.* and this proceeding is about determining "whether it will be the FCC or the federal courts that draw the lines to which they must hew." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. In overlooking this distinction, the telephone industry commenters not only miss the analytical mark but, more importantly, threaten to disrupt the careful balance that Congress struck when in § 635(a) it expressly reserved authority over § 621(a)(1) to the courts.

Moreover, the *Iowa Utils. Bd.* Court's crisp delineation of ancillary jurisdiction does not stand alone. In *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), which involved a legal question very analogous to the one in this proceeding, the Court held that the FCC's ancillary jurisdiction does not reach into areas where the Act itself denies the FCC authority. *See, e.g., Iowa Utils. Bd.*, 525 U.S. at 281 n.7 (stating that *Louisiana Public Service Commission* "involved the Commission's attempt to regulate services over which it had not explicitly been given rulemaking authority"). The fallacy in the telephone industry commenters' arguments here is clear: They ignore that the 1992 Act amended § 635(a) to *include* § 621(a)(1) on the short list of three Cable Act provisions for which Congress explicitly assigned exclusive jurisdiction to the courts. This amendment to § 635(a) was simultaneous with, and integral to, the addition of the "unreasonable refusal" provision in § 621(a)(1) that is a principal focus of the *NPRM's* inquiry. *See* NATOA comments, at 5-7.

The telephone industry's comments also misconstrue *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999).[15] We have already emphasized in our opening comments (at 16-17) the critical distinctions that render *Chicago* inapplicable to telephone industry commenters' sweeping proposition that the FCC has virtually unchecked general authority "to interpret Section 621's franchising requirements." *See* Verizon Comments at 22. Briefly restated,

[15] *See, e.g.,* Verizon Comments, at 22, 25; AT&T Comments, at 35; BellSouth Comments, at 53 n.100, 56; USTA Comments, at 13.

Chicago is most appropriately characterized not as a § 621 case, but as a case construing the definitions listed in § 602 of the Act. Perhaps more importantly, *Chicago* is at most a § 621*(b)(1)* case, not a § 621(a)(1) case. Indeed, § 635(a)'s explicit grant to courts of exclusive jurisdiction over § 621(a)(1) disputes was completely ignored by virtually every single telephone industry commenter.

Even if the sum of the telephone industry commenters' proposed § 621 rules reflected good policy (which they do not), neither industry's estimations, nor "the Commission's estimations, of desirable policy can[] alter the meaning of the federal Communications Act of 1934." *MCI Telecommunications Corp., v. AT&T Co.*, 512 U.S. 218, 234 (1994). What the *NPRM* suggests goes well beyond mere tinkering: "[i]t is effectively the introduction of a whole new regime of regulation (or of free-market competition), which . . . is not the one that Congress established." *MCI*, 512 U.S. at 234. Ultimately, what the telephone industry commenters and their allies seek to accomplish through this *NPRM* proceeding -- FCC adoption of § 621(a)(1) rules that would co-opt the fundamental role that Congress created for LFAs in the franchising process -- is simply not permitted by the Cable Act.

B. Section 706, A Non-Title VI Provision, Does Not Give the FCC Authority to Rewrite Title VI (The Cable Act).

Our opening comments submitted in this proceeding already demonstrate that § 706 of the 1996 Act cannot be read to empower the Commission to "take action" (*NPRM*, at ¶18) on concerns related to the franchising process. There is no indication whatsoever -- in § 706 or elsewhere -- that Congress intended to redraw the jurisdictional boundaries of Title VI and extend its delegation of authority for implementing § 621(a)(1) beyond LFAs and, where

disputes arise, to the courts under § 635(a) . Consequently, § 706 does not grant the FCC the necessary authority to preempt local and state franchising requirements.

As noted in the cable industry's opening comments, the cable franchising issues addressed by the *NPRM* are unrelated to the stated purpose of § 706.[16] While broadband deployment may be "the top priority for this Commission,"[17] that does not mean that § 706 furnishes the FCC with a license to disregard the explicit and controlling provisions of the Cable Act.

Section 706 simply cannot plausibly be read as empowering the FCC to amend or repeal *any* provision of Title VI. And indeed, the Commission itself has already ruled that § 706 is *not* an independent source of Commission authority:

> For the foregoing reasons, we conclude that, in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, *the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority.*[18]

Moreover, the Communications Act does not authorize the FCC to make basic and fundamental changes in the underlying regulatory scheme enacted by Congress. *MCI Telecommunications Corp., v. AT&T Co.*, 512 U.S. 218 (holding that the FCC's power to "modify" the requirements of 47 U.S.C. § 203 does not authorize the FCC to drastically revamp

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[16] Even if § 706 were applicable in the instant proceeding (which it is not), there is no evidence that ILECs' broadband deployment has been hampered by the local franchising process. As Comcast points out (at 34-35), Verizon has already deployed its FiOS broadband service to more than 3 million homes and businesses across 16 states, expects to deploy to 6 million homes by January 2007and to 20 million homes by 2009. *See* Verizon, 4Q 2005 Earnings Release *available at* http://www.investor.verizon.com/news/view.aspx?NewsID=718; John Eggerton, *FiOS Expands in Texas*, Broad. & Cable (Jan. 5, 2006), *available at* http://www.broadcastingcable.com/article/CA6297189.html. The fact that ILECs are deploying their networks without obtaining franchises (by choice) undermines any suggestion that LFAs are impeding their entry.

[17] *Communications Daily*, Vol. 26, No. 53, at 3 (March 20, 2006) (quoting FCC Chairman Martin at his first news briefing).

[18] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Mem. Opin. & Order, 13 FCC Rcd. 24011, 24012 at ¶ 77 (1998) (emphasis added). *See also Order on Reconsideration*, 15 FCC Rcd. 17044 at ¶ 5 (2000) (affirming that the "the most logical statutory interpretation is that section 706(a) does not constitute an independent grant of authority") (internal citation omitted).

the Congressional blueprint for tariff filing by telecommunications carriers). Given Congress' explicit delegation to LFAs of jurisdiction over franchising decisions in § 621(a)(1), subject to court review under § 635(a), any attempt by the FCC to bootstrap the non-Title VI objectives of § 706 into Title VI would reach "beyond the meaning that the statute can bear," and its interpretation would not be entitled to deference. *MCI*, 512 U.S. at 229.

Finally, it is critical that the Commission recognize the absence of evidence indicating any Congressional intent to grant the FCC the authority either to preempt LFAs operating within the intended meaning of § 621(a)(1), or to seize a share of the explicit grant of jurisdiction over § 621(a)(1) matters that Congress specifically reserved to the courts in § 635(a). When Congress intends to preempt state or local government power, it must be "unmistakably clear" in declaring its intention. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal citation omitted).

C. The Telephone Industry's Search for Other Legal Bases for Commission Authority is Unavailing.

Telephone industry commenters also seek to find support for Commission authority to construe and enforce § 621(a)(1) in § 2(a) and § 4(i) of the Communications Act. But their arguments disregard Congress' explicit grant of jurisdiction over § 621(a)(1) to the courts. "Section 4(i) is not a stand-alone basis of authority and cannot be read in isolation . . . . Section 4(i)'s authority must be 'reasonably ancillary' to other express provisions." *Motion Picture Ass'n Of America, Inc. ("MPAA") v. FCC*, 309 F.3d 796, 806-807 (D.C. Cir. 2002).[19] In reaching its holding in *MPAA*, the court rejected as "an entirely untenable position" the FCC's

[19] *See also American Library Ass'n ("ALA") v. FCC*, 406 F.3d 689, 702-703 (D.C. Cir. 2005) (holding that FCC lacked authority to impose broadcast content redistribution rules on equipment manufacturers using ancillary jurisdiction because the equipment at issue was not subject to FCC subject matter jurisdiction over wire and radio communications, noting that the "Supreme Court refused to countenance an interpretation of the second prong of the ancillary jurisdiction test that would confer 'unbounded' jurisdiction on the Commission . . . .") (internal citation omitted).

view that adoption of rules (requiring video description) was permissible merely because Congress did not expressly foreclose the possibility.[20]

Similarly, here, where Congress in §§ 621(a)(1) and § 635(a) has specifically reserved authority to LFAs and, where disputes arise, to the courts, there was no need for Congress to expressly foreclose the prospect of the FCC charting its own course in disregard of that mandate. *See, e.g., Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc), *cert denied*, 514 U.S. 1032 (1995) ("Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (emphasis in original). Congress struck a careful balance in its enactment of §§ 621(a)(1) and 635(a) that made it abundantly clear -- leaving no gaps to fill -- that jurisdiction over § 621(a)(1) rests with the courts, not the FCC. *Ry. Labor Executives'*, 29 F.3d at 671 ("[*Chevron*] deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.' "). In other words, "great caution" is warranted when, as here, the disputed matter of whether the FCC can adopt rules to construe and enforce § 621(a)(1) "rest[s] on no apparent statutory foundation and, thus, appear[s] to be ancillary to nothing." *ALA*, 406 F.3d at 702. The Commission, to adopt rules in the manner it proposes, must locate a source of jurisdiction other than § 4(i) that does not conflict

[20] *MPAA*, 309 F.3d at 805. Construing *MPAA* in a subsequent proceeding, the FCC determined that *MPAA* held that the FCC lacked authority to adopt video description rules because, *inter alia*, Congress "specifically authorized and ordered the FCC to produce a report on video description – 'nothing more, nothing less.' " *Implementation of Section 304 of the Telecommunications Act of 1996*, 18 FCC Rcd. 20885, 20909 n.139 (2003). If the FCC itself acknowledges the limited reach of § 4(i) when specifically authorized to pursue an administrative undertaking (a report) by Congress, surely the same reasoning indicates the inapplicability of 4(i) in the instant *NPRM* proceeding, where Congress, through the inextricable link of §§ 621(a)(1) and 635(a), explicitly allocated authority over § 621(a)(1) disputes to the courts, not the FCC.

with the more explicit provisions of Title VI. Neither the *NPRM* nor the telephone industry commenters have located, or can possibly locate, such a source.

Plainly stated, Congress' decision in § 635(a) to grant authority to courts over § 621(a)(1) disputes cannot be overcome by reliance on § 4(i). Section § 4(i) authorizes only such FCC action as is "not inconsistent with this Act," and any FCC assertion of authority over § 621(a)(1) would be inconsistent with the Act -- specifically § 635(a).

D. Telephone Industry Commenters' First Amendment Arguments Fail.

Verizon's First Amendment argument (at 16) exaggerates the First Amendment implications of franchising decisions by contending that the First Amendment "independently requires strict limits on the discretion afforded to LFAs," when the LFAs are exercising their Congressionally permitted authority under § 621(a)(1). Verizon's argument begs the question of whether a "reasonable refusal" by an LFA would be a facial violation of the First Amendment. Verizon's claim is tantamount to suggesting that § 621(a)(1) itself runs afoul of the First Amendment, a suggestion that the Commission is powerless to accept.

Verizon's First Amendment arguments appear in two places in its comments -- Section I.A on pages 10-21 ("The First Amendment Also Mandates Limited Discretion for LFAs") and Section II.B.3 on pages 47-51 ("The First Amendment Limits the Build-Out that May Be Required"). The first section is a broad attack by Verizon on the local franchising provisions of §§ 611 and 621 of the Act, although couched in terms (Comments at 16) of "the express limits in Section § 621(2)(4) on the factors that LFAs may consider." Verizon begins:

> It is well established that the First Amendment protects cable companies' right to offer video programming services. *Turner Broadcasting Systems v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 288, 494 (1986). Cable operators express speech not only

> through their original programming but also through their editorial decisions over which stations and programs to disseminate. As the Supreme Court has observed, cable providers "communicate messages, on a wide variety of topics and in a wide variety of formats." *Turner I*, 512 U.S. at 636.
>
> The cable franchising system regulated by Section 621(a) presents special risks to these free speech interests. Like many other licensing or permitting schemes, the cable franchise system requires speakers to obtain permission from local authorities *before* engaging in protected speech. This type of control inherently threatens free expression because it conditions speech on the advance blessing of local authorities -- and silences speech until that blessing is received. In addition, by establishing local authorities as gatekeepers, the franchise system places local governments in the position to impose onerous regulatory conditions on cable operators that can deter or even prevent competitive providers from entering the cable market.

Verizon Comments at 17 (emphasis in original).

This is nothing but a facial challenge to the local franchising provisions of the Cable Act, a challenge that is inconsistent with *Turner I*. No one denies that cable providers, including an additional competitive provider, are speakers entitled to First Amendment protection. But this does mean that providers are free from government requirements and restrictions that serve important government purposes not related to the suppression of free expression. Rather, the reasonableness of the kinds of franchise requirements attacked by Verizon must be evaluated as they are applied in specific factual contexts. In the context of both the franchising process and franchising requirements, these factual contexts will, of course, vary from LFA to LFA.

In *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *reh'g en blanc denied*, 105 F.3d 723 (D.C. Cir. 1997), the court rejected a similarly broad First Amendment attack on nine provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") and two provisions of the 1984 Cable Act. In rejecting Time Warner's constitutional challenge to the public, educational, and governmental ("PEG") provision of

Section 611, the court emphasized that the issue of constitutionality must be addressed as applied, not facially:

> To prevail in its facial challenge, Time Warner must "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). Except in the case of an overbreadth challenge, which Time Warner does not make here, "a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797-98, 104 S.Ct. 2118, 2124-25, 80 L.Ed.2d 772 (1984); *see id.* at 798 n. 15, 104 S.Ct. at 2125 n. 15. . . .
>
> Time Warner must therefore show that no franchise authority could ever exercise the statute's grant of authority in a constitutional manner. We can, of course, imagine PEG franchise conditions that would raise serious constitutional issues. For example, were a local authority to require as a franchise condition that a cable operator designate three-quarters of its channels for "educational" programming, defined in detail by the city counsel, such a requirement would certainly implicate First Amendment concerns. At the same time, we can just as easily imagine a franchise authority exercising its power without violating the First Amendment. For example, a local franchise authority might seek to ensure public "access to a multiplicity of information sources," *Turner*, 512 U.S. at ___, 114 S.Ct. at 2470, by conditioning its grant of a franchise on the cable operator's willingness to provide access to a single channel for "public" use, defining "public" broadly enough to permit access to everyone on a nondiscriminatory, first-come, first-serve basis. Under *Turner*, such a scheme would be content-neutral, would serve an "important purpose unrelated to the suppression of free expression," *id.*, and would be narrowly tailored to its goal. Time Warner's facial challenge therefore fails.

Time Warner Entertainment, 93 F.3rd at 972-73. *See also Beach Communications, Inc. v. FCC*, 959 F.2d 975, 984 (D.C. Cir. 1992) ("Because localities have discretion to define the § 621(b) duty, and because the justification for that duty will depend on local facts, petitioners' First Amendment challenge is unripe.")

The test for determining whether a particular franchise requirement has the effect of limiting speech is the *O'Brien* test. As Verizon notes (at 19), such requirements must "further[] an important or substantial government interest . . . the governmental interest [must be] unrelated to the suppression of free expression; and . . . the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest," *Turner I*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (internal quotation marks omitted)).

Verizon's First Amendment arguments related to buildout requirements (at 47-51) are predicated on a claim that build-out requirements "impose burdens that are wholly disproportionate to the benefits they confer." We have discussed the importance of the governmental interests served by reasonable build-out requirements in our opening comments at 32-34 and in these reply comments below at Part II(B). *See also* the discussion of the importance of buildout requirements and anti-redlining requirements contained in the reply comments filed by the Minority Media and Telecommunications Council, *et al.*, particularly with respect to the response to Verizon's First Amendment arguments at (4-5 n.6). Since buildout requirements vary, not only from LFA to LFA, but among different cable operators within an LFA, Verizon has not, and cannot, demonstrate that there is no buildout requirement that serves an important governmental interest, or that the burden of each and every buildout requirement exceeds the benefits it confers.

Furthermore, the FCC does not have the power to find a provision of its governing Act to be unconstitutional.[21] But this is the remedy that Verizon improperly seeks.[22] The proper forum for such drastic relief, however, lies with the courts, not the FCC.

E. The IPTV Services That Telephone Carriers Plan to Provide Are "Cable Services" Subject to Title VI.

Cincinnati Bell argues in its comments that its contemplated launch of an Internet Protocol-based video service ("IPTV") offering to its residential customers is not a "cable service" within the meaning of § 622(6), and that its offering therefore is not subject to the requirement of Section 621 that it obtain a Title VI cable franchise. Cincinnati Bell requests (at 18-19) the FCC "to *expeditiously find* that IPTV service is not subject to regulation under Title VI or state franchising laws" (emphasis added). As Cincinnati Bell itself recognizes, this request clearly exceeds the scope of the inquiry noticed by the *NPRM*.[23]

In order to properly consider this request, and AT&T's similar suggestion that its IPTV offering is not a "cable service" (AT&T Comments at 3), the Commission would have to initiate a new proceeding with proper notification and allow interested parties to file comments to ensure meaningful participation from the public. *See, e.g., PPG Indus. Inc. v. Costle*, 659 F.2d 1239, 1249-51 (D.C. Cir. 1981) (adopted rule may be set aside where the NPRM is published in the Federal Register, but its contents are deemed inadequate to afford a meaningful opportunity to

[21] *See, e.g., Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987) ("[The FCC's] reservation as to its authority [in the underlying proceeding] is predicated on the well known principle that regulatory agencies are not free to declare an act of Congress unconstitutional"); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.")

[22] *See, e.g.*, Verizon Comments at 20 ("And while [adoption of proposed] regulations that give effect to the limits imposed by Congress cannot eliminate the constitutional infirmities inherent in the franchise process and Cable Act themselves, they nonetheless can alleviate some of the most pernicious aspects of the current franchise process.")

[23] Cincinnati Bell states on pages 4-5 of its Comments that "while the Commission did not seek comment on regulatory classification of video programming provided over an ILEC's existing DSL infrastructure, Cincinnati Bell takes this opportunity to briefly explain why its proposed IPTV service offering over existing DSL facilities is not subject to the franchising requirements of Title VI."

comment on the issues in the rulemaking); *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995) (a footnote in the background section of NPRM was not adequate notice to long-distance carriers affected by rulemaking).

In any event, Cincinnati Bell and AT&T are wrong: Under the current Cable Act definitions, IPTV services are a "cable service," and are therefore fully subject to the Title VI requirements that apply to cable operators. Rather than burdening the record with a lengthy discussion of this issue, we adopt NCTA's analysis submitted to the Commission in 2005 in Docket No. 04-36, the "IP-Enabled Services" proceeding.[24]

In addition to the arguments presented in NCTA's filings in Docket No. 04-36. we point out two additional flaws in Cincinnati Bell's and AT&T's claims that IPTV is not a "cable service."

First, AT&T's argument that its IPTV is an "information service"[25] is both premature and irrelevant. As the Commission well knows, the classification of most IP-enabled services, including IPTV, remains unresolved in the *IP-Enabled Services* proceeding.[26] And even if IPTV were an "information service," that does not mean that it is not also a "cable service." In fact, "cable service" is a subspecies of "information service." The "information service" definition in 47 U.S.C. § 153(20) is derived from the AT&T Consent Decree's "information service" definition.[27] Under that Decree, "[t]he provision of cable television service . . . clearly involves

[24] *See* NCTA *Ex parte* letter and memorandum, WC Docket No. 04-36 (filed July 29, 2005) ("NCTA Filing #1"); NCTA *Ex parte* response to SBC paper, WC Docket No. 04-36 (filed November 1, 2005) ("NCTA Filing #2").
[25] SBC *Ex parte* letter, WC Docket No. 04-36 at 3, 15-25 (filed Sept. 14, 2005).
[26] *Vonage Holdings Corporation*, 19 FCC Rcd. 22404, 22411-18 n.46 (2004).
[27] *See* H. Confer. Rep. No. 458, 104th Cong, 2d Sess. 114-16 (1996) *reprinted in* 1996 U.S.C.C.A.N. 124, 125-27.

the generation, transformation and conveyance of information and is thus an information service"[28] -- a conclusion with which the FCC has agreed.[29]

Second, AT&T has suggested that LFAs (indeed all state and local governments) have no jurisdiction over IPTV services because they, like the VoIP services at issue in the FCC's *Vonage Order*,[30] are inherently interstate in nature.[31] But the "inherently interstate" analysis of the *Vonage Order* has no application to "cable services" or to Title VI. Many, if not most, "cable services" are interstate in nature. Unlike Titles I and II, however, Title VI does not draw an intrastate/interstate boundary between federal jurisdiction over cable systems and services, on the one hand, and LFAs' jurisdiction over those systems and services, on the other. Title VI instead provides that LFAs have jurisdiction over local cable systems, regardless whether some of the cable services they provide are interstate in nature, as long as the LFA exercises its jurisdiction in a manner consistent with Title VI. And the specific jurisdictional lines drawn in Title VI, of course, control over the generalized intrastate/interstate lines drawn in Title I and II.

F. The *ECI* Decision is Inapplicable to the Issues in the Instant Proceeding.

AT&T (at 35) and Cincinnati Bell (at 5) contend that *Entertainment Connections, Inc.*, 13 FCC Rcd. 14277 (1998) ("*ECI*"), *pet. for review denied sub nom. City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), *cert. denied sub nom. NATOA v. FCC*, 531 U.S. 825 (2000), supports their claim that "the Commission itself has previously issued orders implementing and enforcing

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[28] U.S. Department of Justice, Response to Public Comments on Proposed Modification of Final Judgment in *U.S. v. Western Electric Co.*, 47 Fed. Reg. 23320, 23335 (May 27, 1982),

[29] *Telephone Company-Cable Television Cross-Ownership Rules*, Notice of Inquiry, 2 FCC Rcd. 5092, 5096 n.26 (1987).

[30] 19 FCC Rcd. at 22413-414, 22418-419.

[31] SBC *Ex parte* notice, WC Docket No. 04-36 at 1-2, 37 (filed Sept. 14, 2005); AT&T *Ex parte* notice, WC Docket No. 04-36 at 2, 6 (filed Jan. 12, 2006).

other aspects of § 621 and overruling franchising authority decisions that violate § 621." This assertion seriously misconstrues *ECI*.

In *ECI*, the FCC "caution[ed] other MVPDs that the [*ECI*] decision is *expressly limited* to the facts before the Commission as presented by ECI." 13 FCC Rcd. at 14311, *ECI*, ¶ 73 (emphasis added). The FCC noted the following unique facts present in *ECI* that limited the applicability of its holding:

> "[W]e note that: (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them; (ii) ECI's facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI's programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI's request; (vi) there is capacity to serve several other programming providers; and (vii) ECI has committed to make its drops available to other programming providers."

Id.

The relationship among Cincinnati Bell and its various subsidiaries (just like the relationship of other ILECs and their video subsidiaries and affiliates) does not, and cannot, meet several of these conditions. We mention only a few of those failings here. In *ECI*, there was absolute separation of ownership between ECI and Ameritech, who were completely unaffiliated with one another. *Id.* This feature is utterly lacking in the case of Cincinnati Bell and its wholly-owned telephone and video subsidiaries. In their corporate arrangement, both Cincinnati Bell Entertainment ("CBE," the video service provider) and Cincinnati Bell Telephone ("CBT," the local exchange carrier whose right-of-way facilities CBE uses), are commonly-owned subsidiaries of Cincinnati Bell. (Cincinnati Bell Comments, at 1 n.1).

ECI also relied on the fact that ECI's facilities were located entirely on private property (*ECI,* 13 FCC Rcd. at 14299 at¶ 47). Once again, this *ECI* factor is not met in the example of Cincinnati Bell. Here, CBE clearly plans to use the "the transmission facilities owned by CBT,"

its 100% commonly-owned affiliate, which of course "do occupy the *public* rights-of-way." (Cincinnati Bell Comments, at 6) (emphasis added). In other words, both the right-of-way facilities to be used (CET's), and the provision of video programming (by CBE), are wholly and commonly-owned by Cincinnati Bell.[32]

Given the these obvious distinctions, neither AT&T nor Cincinnati Bell can rely on *ECI* for the corporate sleight-of-hand they propose to evade the Cable Act's "cable operator" and "cable system" definitions.

II. EVEN IF THE FCC HAD AUTHORITY TO CONSTRUE OR ENFORCE § 621(a)(1) , THE RULES PROPOSED BY THE TELEPHONE INDUSTRY AND ITS ALLIES ARE CONTRARY TO THE CABLE ACT.

Even if one were to ignore the clear link between § 621(a)(1) and § 635(a) that gives courts, not the FCC, jurisdiction over § 621(a)(1), and thus even if one were to assume that the FCC has authority to adopt rules concerning § 621(a)(1) (which it does not), any such rules would still have to consistent with § 621(a)(1) and, more generally, the Cable Act. The series of

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[32] Cincinnati Bell cites (at *id.*, n.14) *City of Austin v. Southwestern Bell Video Service, Inc*, 193 F.3d 309 (5th Cir. 1999), for the proposition that where one subsidiary distributes video programming of through the right-of-way facilities of another subsidiary, the initial subsidiary is not a "cable operator" under the Act. We disagree. As an initial matter, *Austin* is distinguishable because the court there only addresses the question of whether or not Southwestern Bell Video Services ("SBVS") was a "cable operator," not the question of whether its parent, SBC Communications, Inc. ("SBC"), was a "cable operator." 193 F.3d at 312 n.9. To the extent that *Austin* could be construed as holding that neither SBVS nor SBC was a "cable operator," then the *Austin* court was clearly mistaken, since the "cable operator" definition in § 602(5) sweeps together commonly owned affiliates in determining whether such a group of entities collectively is a "cable operator":

> "the term 'cable operator' means any person *or group of persons* (A) who provides cable service over a cable system and directly or through *one or more affiliates* owns a significant interest in such cable system," or (B) who *otherwise controls or is responsible for, through any arrangement*, the management and operation of such a cable system;"

47 U.S.C. 522(5)(A) (emphasis added). Unlike *Austin*, the FCC's *ECI* decision, in its discussion regarding separation of ownership, properly acknowledges the inclusion of affiliates in § 602(5)'s "cable operator" definition. And this factor was directly relevant to the Seventh Circuit's decision upholding *ECI*. *See Chicago*, 199 F.3d at 432 (noting that "Ownership and control are relevant factors under the statutes" and "there is no entity [in *ECI*] which owns a significant interest in the system or who controls, manages, or operates the system as a whole.").

preemptive rules proposed by the telephone industry and its allies, however, are in most cases flatly inconsistent with the Cable Act. The Commission can no more adopt these proposed rules than it can substitute itself for Congress and rewrite the Cable Act.

A. Telephone Industry Proposals To Set Time Limits on LFA Franchising Actions Are Contrary to the Cable Act.

Virtually all proponents of § 621(a)(1) rules urge the Commission to set time limits on LFA franchising decisions.[33] The details vary. AT&T, for instance, proposes a 30-day limit,[34] while Verizon proposes a complex, multiple deadline scheme requiring an LFA to negotiate within 30 days, to complete negotiations within 90 days, and an additional 30 days for the LFA to vote on the applicant's submission, for a total of 120 days.[35] BellSouth proposes a deadline of 90 days, beyond which the franchise application will be deemed granted,[36] and Qwest proposes a 6-month deadline with "deemed granted" effect.[37]

The problem with all of these deadline proposals is that they cannot be squared with the Cable Act and would improperly transform the FCC into a national franchising authority. As we pointed out in our opening comments, to use the specific 120-day deadline for franchise transfers found in § 617 to impute a deadline in § 621(a)(1), where no such statutory deadline exists, is to stand the two provisions on their head.[38]

In fact, the initial franchising process is quite different from the franchise transfer process, and contrary to some ILECs' assertions, those differences mean that the initial franchising process will, and should, inherently be longer (or at least more variable) than the

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[33] *See* AT&T Comments at 74-80; Verizon Comments at 35-38; USTA Comments at 41-46; BellSouth Comments at 36; Qwest Comments at 27; NTCA Comments at 9; FTTH Council Comments at 60-63.
[34] AT&T Comments at 79.
[35] Verizon Comments at 38.
[36] BellSouth Comments at 36. NTCA also proposes a 90-day deadline. NTCA Comments at 9.
[37] Qwest Comments at 27.
[38] NATOA et al. Comments at 35-37.

franchise transfer process. In the case of a franchise transfer, there is a franchise agreement already in place, and the only question is whether a new entity will be permitted to assume that franchise. In the initial franchising process, on the other hand, there is *no* existing franchise in place at all. As a result, in the initial franchising process, the issue is not merely whether the applicant is qualified to hold a franchise, but what the terms of the franchise will be.

This leads to another fatal flaw in the telephone industry's franchising deadline proposals. If an LFA must act within a specific time period but fails to do so, what will the remedy be? And if the remedy is that the franchise applicant's application will be "deemed granted," as some in industry propose, what will the terms and conditions of that franchise be? (This, of course, is not a problem with franchise transfers under § 617, because there is an existing franchise in place that the transferee will assume.) It cannot be, as some in industry propose, that the terms of the new entrant's franchise will be the ones that the applicant unilaterally proposes, because that would allow the applicant to dictate unilaterally its own franchise terms, directly contrary to the Cable Act's overarching requirement that cable franchises must be responsive to local needs and interests as determined by the LFA. *See* 47 U.S.C. §§ 521(2), 531, 541(a)(2)-(4), 542, 544(b) & 546. Nor could the FCC dictate the terms of the applicant's new franchise without the FCC effectively becoming the LFA, in direct contravention of the Cable Act, *e.g.*, 47 U.S.C. §§ 522(10), 542(i) & 544(f).[39]

Furthermore, ILEC proposals to set uniform, nationwide deadlines on the franchising process, and to require the awarding of a franchise if the deadline is not met, fly in the face of § 621(a)(1)'s language, which prohibits only "unreasonable" refusals to award an additional

[39] The most logical option, of course not mentioned by the telephone industry, would be for the franchise applicant to assume a franchise with the same terms and conditions as the incumbent. But because the FCC is not an LFA, it cannot dictate *any* terms of a franchise, and thus even this most logical option would be beyond the FCC's power under the Cable Act.

competitive franchise. This inherently means that there must be such a thing as a *reasonable* refusal. But under the ILEC's deadline proposals, there is not: Once the deadline passes, the LFA cannot "refuse" at all, no matter how unreasonable the applicant's proposal in light of community needs, or how unreasonable or recalcitrant the applicant has been in negotiations with the LFA.

Indeed, as noted in our opening comments (at 36-37), any hard and fast deadline would have the perverse effect of encouraging, and rewarding, franchise applicant's recalcitrance in franchise negotiations. And it would also force LFAs to deny applications to preserve their rights.

At bottom, the difficulties with setting any uniform deadline, as well as the problem of determining what the terms of the applicant's new franchise would be, underscore the inherently local and fact-specific nature of the franchising process, a process that is therefore inherently unsuited to uniform, "one-size-fits-all" FCC rules. And it further confirms the wisdom of what § 635(a) says: Courts, not the FCC, are a much better-suited forum for resolving such local, fact-specific matters as § 621(a) disputes.

B. The Cable Act Forbids The Commission from Preempting Franchise Buildout Requirements.

ILECs and their allies uniformly urge the Commission to adopt rules prohibiting LFAs from imposing buildout requirements on competitive franchise applicants, labeling such requirements an anti-competitive "barrier to entry."[40] As an initial matter, we note the telephone industry commenters and their allies appear to misapprehend -- or perhaps intentionally mischaracterize -- the nature of franchise buildout requirements. Franchise buildout

[40] *E.g.*, AT&T Comments at 44-58; Verizon Comments at 39-51; USTA Comments at 21-25; BellSouth Comments at 30-35; Qwest Comments at 8-13; FTTH Council Comments at 32-36.

requirements almost invariably contain density limitations and also provide a reasonable time for system buildout.[41] RBOCs point to nothing but a few anonymous anecdotes suggesting otherwise.[42] Their draconian anti-buildout proposals are thus little more than a self-serving solution in search of a problem.

But telephone industry's anti-buildout proposals are also directly contrary to the Cable Act. Section 621(a)(4)(A) provides:

> In awarding a franchise, the franchising authority -- (A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service *to all households in the franchise area*;

47 U.S.C. § 541(a)(4)(A) (emphasis added).

Try as they might, telephone industry commenters and their allies cannot escape the plain language of this provision. Verizon makes the boldest attempt. First, it argues that § 621(a)(4)(A) speaks to what an LFA must do (allow a reasonable time for buildout), not to what an operator must do (serve all homes in the franchise area). Verizon Comments at 44. The problem with this argument is that it defies the statutory language: One thing that § 621(a)(4)(A) certainly *cannot* be read to mean is that even if an LFA gives a provider a "reasonable period to time" to do so, the LFA can nevertheless be *forbidden* from requiring an operator to "provid[e] cable service to *all* households in the franchise area." Yet that is precisely what Verizon and its allies improperly urge the Commission to do.

Perhaps sensing this obvious flaw in its argument, Verizon then retreats to the argument that a provider "should be permitted to define its own franchise area." Verizon Comments at 46.

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[41] NATOA et al. Comments at 32-34; Comments of Maryland Counties at 4, 10-12, 39; Comments of Fairfax County, Virginia at 8 and Attachment II, p.1; Comments of Pennsylvania and Michigan Municipalities at 7-8, 11; Comments of Mt. Hood Cable Regulatory Commission at 21; Comments of Manatee County, Florida at 3, 6, 16.

[42] *See, e.g.*, Verizon Comments at Attach. A, McDonnell Decl. at ¶¶ 23-27.

But that is nonsense. If a provider could self-define its franchise area, that would undermine the entire local franchising process envisioned by the Cable Act. Among other things, it would render meaningless not only § 621(a)(4)(A), but also the anti-redlining provision of § 621(a)(3) and the uniform rate provision of § 623(d), since an operator could self-select its service area to avoid every single one of those provisions.

Moreover, Verizon succeeds in disproving its own argument when it relies on early FCC decisions stating that "LFAs should determine 'how best to parcel large urban areas into cable districts,'" and that LFAs are the ones to "decide[] 'the delineation of franchise areas.'"[43] While Verizon is certainly correct that an LFA can define a cable operator's franchise area to be more limited than the LFA's entire jurisdictional area (and many franchise areas are in fact so limited by LFAs), Verizon is wrong in suggesting that operators, rather than LFAs, may define such limited franchise areas. To the contrary, the LFA is responsible for "delineat[ing] franchise areas."

Telephone companies' position that there should be no buildout requirements is also inconsistent with their position that such relief is necessary to spread broadband deployment.[44] They cannot have it both ways. Preempting buildout requirements would be a license for promoting limited, and demographically selective, broadband deployment. It is difficult to see how that is a desirable public policy objective.

In the end, the telephone industry's position about buildout requirements, like most of its other § 621(a)(1) rule proposals, is based on what industry would prefer the Cable Act to be, not

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[43] Verizon Comments at 45 (quoting *1972 Cable Television Report and Order*, 36 FCC 2d 143 at ¶¶ 143 & 180 (1972)).

[44] Verizon Comments at 41, 48-49, 53; AT&T Comments at 44-45, 53; BellSouth Comments at 33, 38.

what the Cable Act actually is. The Commission can no more accept industry's buildout preemption proposals than it can rewrite the Cable Act.

C. Telephone Industry Attacks on Franchise Fee, PEG and I-Net Requirements Rest on Faulty Premises and Are Contrary to The Cable Act.

Telephone industry commenters launch a range of misguided and unwarranted attacks on cable franchise fee, PEG access, and I-Net requirements. These attacks fall generally into four categories: (1) cable franchise fee requirements; (2) treatment of in-kind and monetary PEG grants; (3) treatment of I-Nets; and (4) treatment of LFA application fee and cost reimbursement requirements.

All of the various rules that telephone industry commenters propose not only in this area, but many others, suffer from a procedural defect that the Commission must cure before it can even consider taking any action: These detailed proposals are nowhere to be found in the *NPRM*, and thus there has not been adequate notice and opportunity for analysis and comment on them. For that reason, if the Commission were otherwise inclined to consider adopting some of the telephone industry's proposals (and it should not be), it must propose specific rules on those topics in a further rulemaking and provide an opportunity for comment.

1. There is No Need for FCC Rules on Franchise Fees, and Industry's Fee Arguments Are Wrong.

Some RBOCs urge the FCC to adopt a single, nationwide franchise fee formula.[45] Other telephone industry commenters worry that LFAs seek to include revenues from non-cable services in the franchise fee gross revenue base.[46] But these proposals, and their allegations, are misguided in several respects.

[45] *See, e.g.*, AT&T Comments at 64-70; BellSouth Comments at 41-43.
[46] *See id.*; Verizon Comments at 62-64; FTTH Council Comments at 38-40.

As an initial matter, proponents of franchise fee rules have not shown any widespread LFA abuse, nor any problem that courts are not perfectly capable of handling. Aside from the fact that ILECs' allegations of supposed abuse in this area are anecdotal and almost invariably (and improperly) anonymous and thus unverifiable,[47] the meager number of even these anonymous anecdotes relative to the total number of LFAs nationwide certainly does not suggest any widespread problem in this area, which is the necessary predicate for any FCC action. To the contrary, industry's sparse vignettes point to the conclusion that there are relatively few disputes between LFAs and providers concerning franchise fees and that on the few occasions where disputes do arise, courts are fully capable of resolving them.[48]

A couple of RBOC arguments, however, deserve special mention because they are legally incorrect.

BellSouth (at 42-43) argues that "interactive on-demand services," as defined in Section 602(12), are not a "cable service" and thus should not be included in the franchise fee revenue base. BellSouth is wrong. On its face, "interactive on-demand service" is defined as a service providing "video programming," 47 U.S.C. § 522(12), which is of course included in "cable service" definition, 47 U.S.C. § 522(6)(A) & (B).[49] Furthermore, the video programming component of "interactive on-demand service" is primarily "one-way," 47 U.S.C. § 522(6)(A), because the overwhelming bulk of the service is the downstream delivery of video programming

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[47] *See* Verizon Comments at 62-63 & O'Connell Decl. at ¶ 52. AT&T's and BellSouth's claims in this area appear to be unsupported by any evidence of problems with LFAs at all. *See* AT&T Comments at 64-70; BellSouth Comments at 41-43.

[48] *See ACLU v. FCC*, 823 F. 2d 1554, 1574 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (FCC shares concurrent jurisdiction with courts on franchise fee matters, and FCC should act only where need for nationwide policy is shown).

[49] Moreover, interactive on-demand services are unquestionably made available to all subscribers generally, regardless whether an individual subscriber chooses to subscribe to them, so they would equally clearly be "other programming service" even if they were somehow deemed to go beyond "video programming." *See* 47 U.S.C. §§ 522(6) & 522(14).

content to the subscriber. The subscriber's ability to retrieve, time-shift, change camera angles or otherwise manipulate the video programming provided by an interactive on-demand service, in turn, falls comfortably within the language of "subscriber *interaction*, if any, which is required *for the selection or use* of such video programming or other programming service," 47 U.S.C. § 522(6)(B) (emphasis added).

The conclusion that "interactive on-demand services" are a cable service is further confirmed by the *only* place in the Act where the term is used. The term appears only in one of the exceptions to the "cable system" definition, 47 U.S.C. § 522(7)(C), which provides that a system that otherwise would be considered a "cable system" will not be so considered if it is used "solely to provide interactive on-demand services." Of course, if BellSouth were correct that "interactive on-demand services" are not a "cable service," this exception would be superfluous, because the provision of such services would not make a system a "cable system" in any event. In this respect, the "interactive on-demand services" exception to the "cable system" definition is just like another exception to the cable system definition, 47 U.S.C. § 522(A), which provides that a system that would otherwise be considered a "cable system" will not be so considered if it is used "only to retransmit the television signals of 1 or more television broadcast stations." No one would seriously argue that retransmitted television broadcast signals are not a "cable service" merely because they are included in this exception to the "cable system" definition. To the contrary, the need to create this "cable system" exception is perfectly consistent with the indisputable conclusion that retransmitted broadcast signals are a "cable service." So it is with the "interactive on-demand services" exception to the "cable system" definition: It confirms that "interactive on-demand services" are indeed a "cable service."

Verizon (at 63-64) argues that Section 621(b)(3)(B) prohibits LFAs "from seeking fees based on the provision of telecommunications services." While Verizon is correct that the Cable Act prohibits LFAs from including non-cable services such as telecommunications services in the Title VI cable franchise fee revenue base,[50] Verizon is wrong to the extent that it intends to suggest that § 621(b)(3)(B) or any other provision of the Cable Act preempts a local government from requiring a right-of-way user that is both a cable operator and a telecommunications service or other non-cable service provider to pay non-cable franchise fees or other form of right-of-way compensation for the non-cable services it provides, as long as such non-cable franchise fees are consistent with applicable state law.

The Conference Report to the 1996 Act, in discussing the meaning of the newly added § 621(b)(3), makes this point crystal clear;

> The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manager its public rights-of-way *and charge fair and reasonable fees*."[51]

In other words, while Verizon's (and other ILEC video service providers') provision of telecommunications service is not subject to the 5% *cable* franchise fee set forth in 47 U.S.C. § 542, they are, with respect to their provision of telecommunications and other non-cable services, subject to *non*-cable right-of-way compensation, as long as it is nondiscriminatory and competitively neutral and consistent with state law.

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[50] Verizon is wrong, however, in suggesting that § 621(b)(3)(B) is the reason this is so. The reason is found in § 622(b), which limits the cable franchise fee revenue base to 5% of "a cable operator's gross revenues derived . . . from the operation of the cable system *to provide cable service.*" (Emphasis added.) (The emphasized language, like § 621(b)(3)(B), was added by the Telecommunications Act of 1996.)

[51] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 193 (emphasis added).

2. Contrary to Telephone Industry Commenters' Allegations, In-Kind and Monetary PEG Grants for PEG Capital Facilities and Equipment Over and Above the 5% Franchise Fee Are Clearly Permissible Under the Cable Act.

Some telephone industry commenters complain about PEG financial support obligations, urging the FCC to declare that PEG in-kind and monetary grant obligations over and above the 5% franchise fees are not permissible.[52] But the Commission cannot do that, for any such ruling would be contrary to the Cable Act.

AT&T, for example, asserts (at 65) that any kind of in-kind or monetary support for PEG is a "franchise fee" within the meaning of § 622(g)(1) and 622(g)(2)(B). That is simply not true.

As an initial matter, in-kind facilities or services are not a "tax, fee, or assessment of any kind" within the meaning of § 622(g)(1). The phraseology, "tax, fee, or assessment," plainly refers to monetary payments, not non-monetary in-kind facilities and services, and in case there is any doubt, the legislative history of the 1984 Cable Act removes it, stating that § 622 "defines, as a franchise fee *only monetary payments . . . and does not include . . . any franchise requirements for the provision of services, facilities or equipment.*"[53] While AT&T and other telephone industry commenters are correct in claiming that the Cable Act forbids an LFA from requiring a cable operator to provide non-cable-related in-kind facilities and services, the reason that is true is not found in § 622, but in §§ 624(a) and (b), which restrict the services and facilities an LFA can require a cable operator to provide to those that are "related to the establishment or operation of a cable system."

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[52] AT&T Comments at 65-68; Verizon Comments at 64-72; USTA Comments at 48; BSPA Comments at 3.

[53] H. Rep. No. 934, 98th Cong., 2d Sess. at 65 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4702 ("*1984 House Report*") (emphasis added).

With respect to monetary payments to support PEG, Section 622(g)(2)(C) specifically exempts from the "franchise fee" definition "capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities."[54] Thus, monetary payments to support PEG are *not* a "franchise fee," and not to be offset against the 5% franchise fee cap, as long as those payments are used only for PEG capital facilities and equipment.[55] Moreover, even with respect to non-capital PEG payments, "any payments which a cable operator makes voluntarily relating to support of [PEG] access and which are not required by the franchise would not be subject to the 5 percent franchise fee cap."[56]

Telephone industry commenters are therefore simply wrong in suggesting that the Commission can, or should, limit PEG support payments over and above the 5% franchise fee cap.

3. Commenters' Attacks on Institutional Networks Must be Rejected.

Telephone industry commenters also attack institutional network, or "I-Net," obligations in franchises.[57] But these attacks rest on fatally flawed legal and factual premises.

I-Net opponents point to *City of Dallas v. FCC*, 165 F.3d 341, 350-51 (5th Cir. 1999), and argue that it means that LFAs cannot require ILEC entrants to provide "non-video communications networks or services that they characterize as . . . 'I-Nets' as a condition of receiving a franchise."[58] But they have misread *Dallas* and the Cable Act.

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[54] PEG capital support that is excluded from the "franchise fee" definition would include monetary grants used for PEG studio equipment and facilities, and institutional networks. *See* §§ 611, 622(g)(2)(C) & 624(b).

[55] While AT&T (at 66. n.83) cites the Cable Services Bureau decision in *City of Bowie, Maryland*, 14 FCC Rcd. 7674 (1999), it inexplicitly overlooks the Bureau's subsequent clarification of that decision which makes this point clear. *See City of Bowie, Maryland*, 14 FCC Rcd. 9596 (1999). For the same reason, Verizon's reliance (at 70) on *Cable TV Fund 14-A, Ltd. v. City of Naperville*, 1997 WL 433628 at *12 (N.D. Ill. filed July 29, 1997), is misplaced.

[56] *1984 House Report* at 65 (quoted in *City of Bowie, Maryland*, 14 FCC Rcd. at 9598).

[57] *E.g.*, Verizon Comments at 72-75; AT&T Comments at 67-70; BellSouth Comments at 39-40.

[58] Verizon Comments at 72.

The Cable Act defines an "institutional network" as "a *communication* network which is constructed or operated by a cable operator and which is generally available only to subscribers who are not residential subscribers." 47 U.S.C. § 531(f) (emphasis added). Thus, telephone industry arguments that I-Nets are somehow limited to video service fly in the face of the statute, which refers to I-Nets as a "*communications* network" -- which would clearly encompass non-video services, such as data transmission and telecommunications.[59] They also fly in the face of reality: Today, I-Nets provided by cable operators are used by LFAs for a variety of non-video applications, such as data and voice communications, and those I-Nets perform vital public safety and homeland security communications functions.[60] That is a capability that LFAs and, indeed, local residents and our nation, cannot afford to lose in these dangerous times.

Telephone industry commenters are equally mistaken in asserting that *Dallas* or the Cable Act somehow prevents LFAs from requiring access to their "communication networks" for I-Net use as a condition to granting a cable franchise. The issue is *not* whether LFAs can "require cable operators to build [I-Nets]," but rather whether LFAs can "require . . . that . . . channel capacity on [I-Nets] be designated for educational or governmental use." *Dallas*, 165 F.3d at 350 (quoting § 611(b)). Section 611(b) clearly allows LFAs to do that.

Cable operators that are ILECs -- and certainly all RBOCs -- undoubtedly have "existing institutional networks." *Dallas*, 165 F.3d at 350. Indeed, by their own admission, the primary

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[59] Any doubt on this score is removed by § 621(b)(3)(D), which exempts "institutional networks" from its general prohibition on LFAs to require telecommunications service. If RBOC commenters were correct the I-Nets were limited to video services, § 621(b)(3)(D) would be surplusage. *Cf. Dallas*, 165 F.3d at 351 (rejecting a argument that would reduce § 621(b)(3)(D)'s "institutional network" exception to surplusage).

[60] *See* Comments of the Communications Division, Designated Cable Franchise Agency in the City of St. Louis, Missouri at 22-23; Comments of Maryland Counties at 9, 14; Initial Comments of the Burnsville/Eagan Telecommunications Commission, the City of Minneapolis, Minnesota, the North Metro Telecommunications Commission, the North Suburban Communications Commission, and the South Washington County Telecommunications Commission at 10-12; Comments of the City of Indianapolis at 4, 6; Comments of the Michigan Coalition at 60; Comments of the San Mateo County Telecommunications Authority, San Mateo County, Silicon Valley, California at 4.

driving force behind ILECs' efforts in the *NPRM* is their deployment of broadband networks that provide voice, data and video services.[61] And portions of those networks' capacity are almost undoubtedly (as least in most cases) "available only" to non-residential subscribers within the meaning of § 611(f). Therefore, at least for those new cable franchise applicants that meet this description (and almost all ILECs will), the Cable Act allows an LFA to require the operator to designate capacity on those institutional networks for educational and governmental use, § 611(b).

Telephone industry commenters nevertheless complain that requiring them to designate I-Net capacity would be "unnecessary" and "wasteful" because it would duplicate I-Net capacity already provided by the incumbent cable operator.[62] But there is no reason, or evidence, to suppose that all of an LFA's I-Net needs are met by the incumbent's I-Net, or that new capacity will not be needed to meet growing local governmental or educational needs, either in terms of new locations to be served, additional transmission capacity, or to provide redundancy for security or public safety reasons. Certainly that is not a judgment the FCC is in any position to make on a nationwide basis, because local needs and interests vary, as not only the entirety of the Cable Act recognizes, but also as the Act incorporates as one of its primary goals, *see* 47 U.S.C. § 521(2).

[61] *See, e.g.*, AT&T Comments at 1-2; Verizon Comments at i; Comments of Cincinnati Bell, Inc. at 2; Comments of BellSouth at 4.

[62] *E.g.*, BellSouth Comments at 40.

4. Application Fees, Cost Reimbursement Requirements and Indemnity Provisions Are Requirements or Charges Incidental to the Awarding or Enforcing of a Franchise Within the Meaning of § 622(g)(2)(D).

Some RBOCs urge the Commission to adopt rules prohibiting, or severely limiting, an LFA's ability to assess a franchise application fee, acceptance fee, and LFA application processing cost reimbursement requirements over and above the 5% franchise fee.[63] In support of this claim, they rely on one reversed district court decision,[64] two unreported district court decisions,[65] and a single reported district court opinion.[66]

Once again, there is nothing the *NPRM* that gives the public even the remotest notice that the FCC might possibly adopt rules such as those proposed by the RBOCs on this topic. And in fact, virtually all of the telephone industry's other proposed rules, except perhaps those relating to deadlines for LFA actions on franchise applications and buildout requirements, suffer from this defect. For this reason alone, the Commission cannot adopt industry's proposed rules, at least not without the FCC itself actually proposing such rules and then providing an opportunity for the public to comment on them.

But the RBOCs' attempts to eliminate franchise application fees and cost reimbursement requirements are also contrary to the Cable Act. Section § 622(g)(2)(D) provides the following exception to the Cable Act's "franchise fee" definition:

> (2) the term "franchise fee" does not include –
> . . .

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[63] *See* Verizon Comments at 62; AT&T Comments at 67.
[64] *Charter Communications v. County of Santa Cruz*, 133 F.Supp. 2d 1184 (N.D. Cal. 2001), *rev'd*, 304 F.3d 927 (9th Cir. 2002).
[65] *Time Warner Entertainment Co. v. Briggs*, 1993 U.S. Dist. LEXIS 1196, 1993 WL 23710 (D. Mass. Jan. 14, 1993); *Birmingham Cable Communications v. City of Birmingham*, 1989 U.S. Dist. LEXIS 7475, 1989 WL 253850 (N.D. Ala. 1989).
[66] *Robin Cable Systems v. City of Sierra Vista*, 842 F.Supp. 380 (D. Ariz. 1993).

(D) requirements or charges *incidental to* the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification penalties, or liquidated damages.

47 U.S.C. § 542(g)(2)(D) (emphasis added).

Verizon and AT&T, like the misguided (and mostly unreported or reversed) district court decisions on which they rely, have simply misread the statutory language. They believe that the word "incidental" in § 622(g)(2)(D) means "incidental" *in amount*.[67] But that is not what § 622(g)(2)(D) says. It instead refers to "requirements or charges *incidental to the awarding or enforcing* of the franchise." When followed by the preposition "to," "incidental" means "likely to happen or naturally appertaining."[68] Obtaining a mortgage, for instance, is typically "incidental to" buying a house, but the mortgage is not necessarily (or even usually) "incidental" in amount.

In contrast, Verizon and AT&T improperly urge the Commission to rewrite § 622(g)(2)(D) either to read "*incidental* requirements or charges *incidental to* the awarding or enforcing . . .," or to read "requirements or charges *incidental in amount and* incidental to the awarding or enforcing . . . ." The Commission is powerless to rewrite the statute in either way.

There is another reason why the term "incidental" in § 622(g)(2)(D) cannot be read to be incidental in amount. The other "charges or requirements" listed as examples in § 622(g)(2)(D) -- "bonds, security bonds, letters of credit, insurance, indemnification, penalties, or liquidated damages" -- cannot plausibly be construed to be invariably incidental in amount. In fact, some, such as insurance or indemnification, which could come into play if a cable operator's error resulted in a sizable casualty accident in the right-of-way or elsewhere, must and

[67] *E.g.*, Verizon Comments at 60 (quoting *Robin Systems*, 842 F.Supp. at 381).
[68] *Random House Dictionary of the English Language*, at 720 (Unabridged Ed. 1967). "Incidental" means small in amount, in contrast, when it is used as a modifying adjective preceding a noun. *See id.*

should be quite large. The point is twofold: (1) it simply is not plausible to read the list of "requirements and charges" in § 622(g)(2)(D) as inherently small in amount, and (2) circumstances will vary from community to community, depending on such factors as the size of the community and the nature of a cable operator's franchise violation or casualty-causing behavior, among others.

Thus, while it may be true that an application fee or cost reimbursement requirements must be reasonable in amount, there is no one-size-fits-all amount -- and certainly not the $5,000 amount proposed by AT&T (at 66) -- that is amenable to adoption in any FCC rule. The amount of such application fees and cost reimbursement depends on a variety of factors, not the least of which is how cooperative, or recalcitrant, the applicant is in the franchise application and negotiation process.[69]

AT&T's related proposal (at 66) -- that the costs an applicant incurs in connection with an obligation to indemnify the LFA against lawsuits arising out of the granting of the franchise to the applicant are a "franchise fee" -- is absurd. First of all, "indemnification" is explicitly excluded from the "franchise fee" definition by § 622(g)(2)(D). Second, indemnification provisions of the type described by AT&T are common in virtually all municipal franchises, both cable and non-cable alike. The reason: A municipality's granting of a franchise to a private concern to use the rights-of-way for private profit-making is an action whose primary beneficiary is the franchisee, not the municipality whose rights-of-way the franchisee will be using. Therefore, the franchisee (and its shareholders and customers) should bear the financial risk of that benefit, not the municipality's general taxpayers.

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[69] *See, e.g.*, NATOA *et al.* Comments at 28-30; TCCFUI Comments at 10-18.

D. RBOC Arguments That Their Mixed Use Systems Are Not "Cable Systems" Are Contrary to The Cable Act.

The RBOCs argue, in various ways, that the entirety of their upgraded broadband systems -- which are unquestionably built to offer cable services, among other services -- are not "cable systems" within the meaning of § 602(7).[70] In one important sense, these arguments are a straw man: The issue is not whether an RBOC's mixed-use broadband system is a cable system "in its entirety." Nor is it a question of whether a RBOC's broadband system is a cable system in part if it is used to provide cable service. The RBOCs do not -- and cannot -- dispute that their broadband systems are a cable system in part if used to offer a cable service.[71]

Rather, the real question is what is a "cable system" under § 602(7)(C) when the same physical plant is intended to be used to deliver both cable and telecommunications services.[72] And the Cable Act answers that question: A "cable system" is "a facility, consisting of [among other things] a set of closed transmission paths," and "a facility of a common carrier" is also a "cable system" "*to the extent such facility is used* in the transmission of video programming

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[70] Verizon Comments at 80-88; AT&T Comments at 71-72; BellSouth Comments at 45-47.

[71] Verizon Comments at 83 (quoting § 602(7)(C)); BellSouth Comments at 46 (appearing to concede that its upgraded system is a cable system in part once "cable service is actually offered over that network"). AT&T (at 71) appears the only possible exception, but that is based on its view that its IPTV service is not a "cable service" and thus it is not a "cable operator" – a view that is patently incorrect, *see* Part I(E) *supra*.

[72] The RBOCs repeatedly refer to upgrades of their "existing telephone networks" or to themselves as existing "telecommunications carriers" authorized to use the right-of-way, as well as pointing to the alleged relevance of § 253, which preempts state or local requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide . . . telecommunications service." Verizon Comments at 84; AT&T Comments at 71; BellSouth Comments at 46 & n.78. As an initial matter, the franchise requirements of Title VI cannot plausibly be construed to be a "barrier to entry" under § 253. Moreover, while it is certainly true that the RBOCs are telecommunications service providers authorized by state and local law to use the rights-of-way to provide telecommunications services, they are playing a shell game with service definitions: As the FCC is well aware, to escape the regulatory obligations of telecommunications carriers the RBOCs have elsewhere vigorously argued to the FCC that virtually all of the new services they intend to provide over their new broadband networks are "information services" rather than "telecommunications services." *See, e.g.*, Memorandum of Points and Authorities in Support of Verizon's Petition for Declaratory Ruling or Interim Waiver and Conditional Petition for Forbearance with Respect to Broadband Services Provided Via Fiber to Premises, WC Docket No. 04-242 (filed June 28, 2004) at 3-4. Here, in contrast, they seek to hide behind § 253, which of course only deals with "telecommunications services." The Commission should not allow the RBOCs to have it both ways.

directly to subscribers . . . ." § 607(7)(C) (emphasis added). This means that, to the extent that a common carrier facility is used to provide cable services, it is *both* a cable system *and* a common carrier facility, and that the "cable system" component of the mixed-use facility includes the facility's "set of closed transmission paths" -- *i.e.,* its physical wires and cable (among other things). And the legislative history removes any doubt on this point:

> The term 'cable system' is *not* limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well. *A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.*[73]

Thus, there can be no question that, to the extent that the RBOCs' upgraded networks are "designed to include the provision of cable services . . . along with [non-cable services]" (and the RBOCs' upgraded networks unquestionably are), those networks *are* a "cable system."[74]

But this legal conclusion does not, and need not, result in the supposed problems or "barriers" about which the RBOCs complain. Although the RBOCs assert otherwise, there is simply *no credible evidence at all* in the record that LFAs are in any way hampering RBOC network upgrades by demanding a cable franchise before any network upgrade activity can commence.[75]

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[73] *1984 House Report* at 44 (emphasis added).

[74] It is therefore undeniably true that, although Verizon wishes it were otherwise, "once Verizon begins to offer video over its FTTP network," all of the wires and other facilities Verizon uses to provide that service are a "cable system," regardless whether those wires and facilities are also used to provide non-cable service. Verizon Comments at 80 & O'Connell Decl. at ¶ 49.

[75] The best Verizon can come up with to the contrary is one un-named Virginia "town," and two communities in New York where Verizon's position prevailed before the New York Public Service Commission. Verizon Comments at 80-81 & n.49. The best BellSouth can come up with is a FCC proceeding resolved six years ago, and a pending lawsuit by AT&T against the City of Walnut Creek in California. BellSouth Comments at 46 & nn.76-78. And AT&T comes up with no examples at all. This is hardly a basis for any Commission action. Indeed, given the paltry nature of the RBOCs' evidence relative to the number of LFA commenters where RBOC network upgrades are occurring, the record is powerful evidence *against* the need for any FCC action.

As is the case with so many of the RBOCs' other proposed FCC rules, RBOC "cable system" definition complaints are therefore a draconian solution in search of a non-existent problem. But the RBOCs' proposals in this regard are more pernicious than that. They are blatantly improper attempts to deceive the Commission into taking positions clearly contrary to the Cable Act. For example, BellSouth complains about the City of Walnut Creek's conditioning the issuance of a ROW permit to AT&T on AT&T's agreement that it will not provide video service without first obtaining a franchise.[76] Yet what could possibly be objectionable about Walnut Creek's position? That city is *not* conditioning the ROW permits for AT&T's system upgrade on AT&T first obtaining a cable franchise, but only on AT&T's agreement to do precisely what the Cable Act requires: to obtain a cable franchise before providing video service. *See* §§ 607(7)(C) and 621(b)(1). *See also* Cal. Govt. Code § 53066. How requiring AT&T to abide by law as a condition for receiving a ROW permit is any sort of "barrier" at all, much less an unlawful one, no RBOC can explain.

Similarly misleading is Verizon's assertion (at 83) that "[t]he purpose of franchise requirements is to preserve local control over the use of public rights-of-way" and since, according to Verizon, it already has the right to use the ROW for telephone service, the "purpose" of a cable franchise is mooted. While ROW management and control is unquestionably *one* of the purposes of local cable franchising, it is not the *only* purpose of cable franchising. Rather, the purpose of cable franchising is to assure that a cable system is responsive to *local* community needs and interests, and those needs and interests extend well

[76] BellSouth Comments at 46 n.78 (citing *Pacific Bell v. City of Walnut Creek*, No. C-05-4723 MC (N.D. Cal. filed Nov. 17, 2005)).

beyond ROW use and management to such matters as PEG requirements, I-Nets, customer service standards, and buildout requirements.[77]

Likewise mistaken is Verizon's wholly unsupported suggestion (at 83) that its network upgrades to provide cable and other services "do[] not change the character or extent of its use of the rights-of-way." In fact, RBOC system upgrades of their existing telephone networks to provide video and other broadband services do in fact often entail considerable new construction work in the ROW and the installation of sizable new cabinets and other facilities in the ROW.[78]

What RBOCs are really seeking from the FCC is a license to run roughshod over virtually all local ROW requirements and to end-run the cable franchise process even after they offer video services over their upgraded networks. But that the Commission cannot, and should not, do.

E. AT&T's Proposal That the FCC Preempt "City-Specific" Customer Service Standards Is Contrary to The Cable Act and FCC Rules.

AT&T (at 72-73) urges the FCC to adopt rules preventing LFAs from adopting "city-specific" customer service standards, and data collection requirements by which compliance with such standards is measured and enforced. According to AT&T, such standards should be preempted because it is more inconvenient and costly for AT&T to have to comply with such city-specific requirements.

As an initial matter, AT&T does not explain why it (and presumably other telephone company cable franchisees) is unable to satisfy such requirements when incumbent cable

[77] *See* NATOA *et al.* Comments at 26-30; Comments of the Michigan Coalition at 5-8; Comments of the Maryland Counties at 31-35; Comments of the San Mateo County Telecommunications Authority, San Mateo County, Silicon Valley, California at 10.

[78] *See, e.g.,* Stephanie McCrummen, "Fiber-Optic Cable Work Has Officials on Watch for Problems," *Washington Post* (June 9, 2005) at VA-03; Marshall and Brewer, "San Ramon Welcoming AT&T Plan Livermore, Walnut Creek Aren't," *Contra Costa Times* (Feb. 15, 2006), available at http://www.mercurynews.com/mld/mercurynews/news/breaking_news/13881671.htm

operators (who have been consolidating and centralizing their customer service operations for years) have nevertheless somehow managed to do so. But the short answer to AT&T's proposal is that the Cable Act and FCC rules specifically allow LFAs to do what AT&T urges the Commission to preempt. The Cable Act allows an LFA, by "municipal law or regulation," to establish and enforce "customer service requirements that exceed the standards set by the Commission . . . or that address[] matters not addressed by the standards set by the Commission." 47 U.S.C. § 552(d)(2). *Accord* 47 C.F.R. § 76.309(b)(4). AT&T's attempt (at 73) to sidestep these clear provisions by pointing to the language in § 632(d)(2) referring to the alternative possibility of a cable operator's voluntarily agreeing to customer service standards exceeding the Commission's standards is unavailing. Both § 632(d)(2) and the FCC's rules clearly provide a municipality with the alternative of imposing such standards unilaterally by municipal "law or regulation," and the FCC has also recognized the additional alternative of imposing such standards through "the franchising process"[79] -- the very process from which AT&T improperly seeks relief.

Once again, AT&T's real complaint is with the Cable Act, not LFA actions. And the Commission cannot rewrite the Cable Act to suit AT&T's business preferences.

F. AT&T's Request To Preempt LFA "Demands" For Space in Local Headend Facilities Is Wholly Unsupported and Contrary to Law.

AT&T (at 70) makes the peculiar and baseless claim that the FCC should preempt supposed LFA "demands" that new entrants utilizing AT&T's system architecture provide "space" in its "headend buildings" for PEG "studios, equipment and personnel." This claim is peculiar, and grossly unwarranted, in two respects.

[79] *See Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 2892, 2895-96 (¶ 12) (1993) (quoted in AT&T Comments at 73).

First, AT&T cites absolutely *no* examples where an LFA has ever made such a "demand." It is therefore difficult to understand what AT&T is complaining about.

Second, AT&T also mischaracterizes the nature of the so-called headend "space" requirements in incumbent operator's franchises to which it refers. To be sure, some franchises require an incumbent cable operator to provide a PEG studio or studios. Those studios may or may not happen to be located near the operator's headend, but a franchise agreement seldom, if ever, requires that it be so located. And although AT&T's system architecture may differ somewhat from that of traditional incumbent cable operators, it is wrong in suggesting (at 70) that incumbent operators' hybrid fiber/coax systems do not have neighborhood nodes, or that those systems do not have a single headend serving multiple LFA areas.

AT&T does not (AT&T Comments at 70), and cannot (*see* §§ 611, § 621(a)(4)(B) & 622(g)(2)(C)), claim that it is immune from being required to provide adequate PEG equipment and facilities, including studios, nor that it is immune from being required to pick up PEG signals at PEG origination points and deliver them to subscribers over its system. So regardless where such PEG studios and other facilities and equipment may be located in relation to AT&T's headend or other network facilities, and regardless how AT&T's interconnection with PEG origination locations is accomplished, an LFA can require AT&T to provide these facilities and services. The reason PEG studios and interconnection are sometimes located near a cable system headend is, ironically enough, to reduce the cable operator's investment costs. It is difficult to understand why AT&T would ask the FCC for a rule that would prohibit these requirements from being accomplished in one particular way, even if that way might happen to be the most cost-efficient way in a particular market.

G. Telephone Industry Attacks on "Level Playing Field" Requirements Are Unwarranted.

Telephone industry commenters and their allies virtually unanimously urge the Commission to preempt so-called "level playing field" requirements.[80] Many such requirements are state laws, but similar provisions are also sometimes included in incumbent cable franchise agreements or LFA ordinances.

It is true that state "level playing field" laws can sometimes complicate an LFA's task of awarding competitive cable franchises. Such state laws typically require an LFA to walk the line between not "unreasonably refusing to award an additional competitive franchise" within the meaning of § 621(a)(1) while, at the same time, not granting a competitive franchise that is "more favorable or less burdensome" than the incumbent's franchise.

But industry's blanket attacks on "level playing field" requirements are misguided in several respects. First, because only courts, not the FCC, can construe and enforce § 621(a)(1)'s "unreasonable refusal" requirement,[81] § 621(a)(1) furnishes the Commission with no authority to preempt state level playing field laws, just as it furnishes the Commission no such authority with respect to individual LFA franchising decisions.

Second, there is little or no evidence to suggest that state level playing field laws have had anywhere near the draconian effect on the granting of competitive franchises as the telephone industry alleges. The evidence in the record about how many competitive franchises LFAs have in fact granted certainly belies this allegation.[82] Moreover, those courts that have construed state level playing field laws have interpreted them as not requiring identical treatment

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[80] Verizon Comments at 76-80; AT&T Comments at 41-42; BellSouth Comments at 43-45, USTA Comments at 41, 51-57; FTTH Council Comments at 63-64.

[81] *See* Part I *supra* and NATOA *et al.* Comments at 4-21.

[82] *See* NTCA Comments at 9-10; Comcast Comments at 5-6; Comments of the League of Minnesota Cities and the Minnesota Association of Community Telecommunications Administrators at 2, 6 and Exhibits A - C.

of the incumbent and the newcomer, or a provision-by-provision comparison of the incumbent's and the newcomer's franchises, but instead requiring only an assessment of whether the newcomer's franchise, taken as a whole, is more favorable or less burdensome than the incumbent's.[83]

Third, to the extent that opponents of level playing field requirements mean to suggest that the FCC can or should untether the terms of competitive franchises from those of the incumbent's cable franchise, or that competitive franchises should not have to be comparable to the incumbent's franchise, they are simply wrong. As we noted in our opening comments,[84] and several other parties agreed,[85] the competitor's franchise should be comparable to the incumbent's in terms of meeting local cable-related needs and interests such as PEG capacity and support, I-Nets and similar requirements.[86] The reason is obvious: The touchstone of the Cable Act is that a cable system must be responsive to *local* community cable-related needs and interests, *not* cookie-cutter, federally-determined needs and interests.[87] The incumbent's franchise is by definition the most recent embodiment of an LFA's determination of its local cable-related needs and interests. While that certainly does not mean that a competitive

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[83] *See, e.g., New England Cable Television Assn. v. Dept. of Public Utility Control*, 247 Conn. 95, 717 A.2d 1276 (1998); *United Cable Television Services Corp. v. Dept. of Public Utility Control*, 235 Conn. 334, 663 A.2d 1011 (1995); *Knology, Inc. v. Insight Communications Co.*, 2001 WL 1750839 (W.D. Ky. March 20, 2001).

[84] NATOA *et al.* Comments at 29-30 & 34-35.

[85] *See* NCTA Comments at 12-19; Comments of the League of Minnesota Cities and the Minnesota Association of Community Telecommunications Administrators at 17-18; Comments of the Greater Metro Telecommunications Consortium, the Rainier Communications Commission, Howard County, Maryland, the Cities of Bellevue and Olympia, Washington and the Washington Association of Telecommunications Officers and Advisors at 13, 15.

[86] NATOA *et al.* Comments at 29-38. *See id* at n.33 for what we mean by "comparable."

[87] NATOA *et al.* Comments at 3, 12-13 & 35; NCTA Comments at 12-19; Comments of the Michigan Coalition at 45-46; Initial Comments of the Public Cable Television Authority, City of Canyon Lake, California, City of Chino, California, City of Duarte, California, City of Encinitas, California, City of Glendale, California, City of Hawthorne, California, City of Irvine, California, City of Laguna Beach, California, City of Laguna Niguel, California, City of La Palma, California, City of La Quinta, California, City of Moreno Valley, California, City of San Clemente, California, City of Santa Cruz, California, City of Torrance, California, City of Twentynine Palms, California, County of Santa Cruz, California, and County of San Diego, California at 10-11; Comments of Pennsylvania and Michigan Municipalities at 3-4, 22.

franchise must or should be identical to the incumbent's (in fact, competitive franchises are rarely, if ever, identical to the incumbent's), it does mean that the competitive franchise should be comparable to the incumbent's in terms of its responsiveness to local cable-related needs and interests, taking into account, of course, differences in the facts and circumstances that may apply to the incumbent and the newcomer.[88] And because local cable-related needs and interests, as well as the facts and circumstances surrounding each competitive franchise application, will inevitably vary from LFA to LFA, these are matters that are inherently not amenable to any "one-size-fits-all" Commission rule or policy.

That brings us to the final point. Congress gave § 621(a)(1) disputes to the courts rather than the FCC for a very good reason: Such disputes are inherently fact-specific, and thus are ones that the courts are particularly well-suited to handle, and that the FCC is particularly ill-equipped to handle. They are also disputes that, if left in the hands of the FCC rather than the courts, would threaten the local community needs-based form of franchising that the Cable Act endorsed and preserved.

We submit that this is a balance that has worked very well, and that the record here, stripped of the telephone industry and its allies' rhetoric and anonymous anecdotes, amply supports. While industry clearly disagrees with the Cable Act's (and our) preferences in this regard, the proper forum for any relief is not the Commission, but Congress. The Commission should use the occasion of the *NPRM* to instruct the telephone industry firmly that regardless of

[88] Telephone industry commenters' claim that § 621(a)(1) somehow empowers the FCC to relieve them of any comparability obligations with incumbent franchises is also belied by the FCC's own open video system ("OVS") rules, which explicitly require an OVS operator to abide by PEG and related obligations that are measured by the PEG and related obligations of the incumbent cable operator, and thus will vary from LFA to LFA. *See* 47 U.S.C. § 76.1505. This comparability requirement is also embodied in the Act itself. *See* 47 U.S.C. § 573.

how the Commission my feel about the merit of industry's policy arguments, the Commission is not the proper forum to resolve them.

CONCLUSION

For the foregoing reasons and those set forth in our opening comments, the Commission should decline to adopt any rules or guidelines to implement or enforce § 621(a)(1)

Respectfully submitted,

/s/ Tillman L. Lay

James N. Horwood
Tillman L. Lay
Ruben D. Gomez
SPIEGEL & MCDIARMID
1333 New Hampshire Avenue, N.W.
Second Floor
Washington, D.C. 20036
(202) 879-4000

Counsel for NATOA et al.

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Ex Parte Presentation
Video Franchising

National League of Cities

National Association of Counties

National Association of Telecommunications Officers and Advisors

The United States Conference of Mayors

Alliance for Communications Democracy

Alliance for Community Media

NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer cable franchising and telecommunications policy for the nation's local governments.

NLC is the oldest and largest national organization representing municipal governments throughout the United States. It serves as a resource to and an advocate for more than 18,000 cities, villages, and towns in furtherance of its mission to strengthen and promote cities.

NACo is the only national organization that represents county governments in the United States. It serves as a national advocate for counties; acts as a liaison with other levels of government; and provides legislative, research, technical and public affairs assistance to its members.

The USCM is the official nonpartisan organization of the nation's 1,183 cities with populations of 30,000 or more. Its mission is to promote effective national urban/suburban policy, strengthen federal-city relationships and ensure that federal policy meets urban needs.

ACM is a nonprofit, national membership organization that represents 3,000 public, educational and governmental cable television access organizations and community media centers across the nation. It pursues its mission of assuring access to electronic media for all through its legislative and regulatory agenda, coalition building, public education, and grassroots organizing.

ACD is an advocacy group for public access television, dedicated to preserving and strengthening community access to media through educational programs and participation in court cases involving franchise enforcement and constitutional questions about community television.

Ex Parte Presentation of NATOA, NLC, NACo, USCM, ACM and ACD

I. Local Governments Support and Encourage Competition.

- Local governments embrace technological innovation and competition in the video marketplace. Cities and counties across the country want and welcome real competition in a technologically neutral manner and support the deployment of competitive new video services and broadband as rapidly as the market will allow. Indeed, over the years local governments have granted competitive franchises virtually everywhere such a franchise has been sought. Unfortunately, relative to the number of local franchising authorities ("LFAs") nationwide, to date competitive franchises have been sought in relatively few jurisdictions.

- LFAs are responsible for protecting the use of the public rights-of-way ("PROW"), ensuring access to PROW-based video services for all residents, and requiring appropriate support for public, educational and government ("PEG") access channel capacity and facilities and institutional networks ("I-Nets"). In this way, the local franchising process fulfills the long-standing Congressional policy that the cable franchising process must assure that cable systems are "responsive to the needs and interests of the local community."

- The NPRM emphasized that parties should submit "empirical data" and "specific examples" of abuses of the franchising process and the extent to which LFAs "unreasonably" refuse to award competitive franchises. As pointed out in Part III below, telecom industry rule proponents have failed to provide what the NPRM requests.

II. Summary of Position of NATOA, NLC, NACo, the USCM, ACM, and ACD.

A. The Commission Lacks Legal Authority To Construe Or Enforce Section 621(a)(1).

- The Commission has no authority to adopt rules to implement, or enforce, § 621(a)(1). Read together, Sections 621(a)(1) and 635(a) clearly vest the courts, not the FCC, with exclusive jurisdiction over § 621(a)(1).

- Congress' explicit grant of jurisdiction over § 621(a)(1) matters to the courts precludes imputing jurisdiction to the Commission. Courts already have concurrent jurisdiction with the FCC over several Cable Act provisions not listed in § 635(a). If all § 635(a) did was grant concurrent jurisdiction over § 621(a)(1) to the courts, it would be meaningless. *See National Association of State Utility Consumer Advocates v. FCC,* No. 05-11682 (11th Cir., July 31, 2006).

- The Commission cannot rely on § 2(a) of the Communications Act, 47 U.S.C. § 152(a), to exercise "ancillary" jurisdiction. Where Congress has specifically reserved franchising authority to LFAs, and dispute resolution to the courts, as it has in §§ 621(a) and 635(a), there is no need for Congress to also expressly foreclose the possibility of Commission jurisdiction. *See, e.g., Ry. Labor Executives' Ass'n. v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994). The explicit grant of jurisdiction to the courts in §§ 621(a)(1) and 635(a) precludes imputing such jurisdiction to the Commission.

- The cable franchising process is inherently local and fact-specific, and a "one-size-fits-all" approach is antithetical to Congress' intent that cable systems be "responsive to the needs and interests of the local community." Because § 621(a)(1) disputes are inherently fact-specific, courts, rather than the Commission, are particularly well-suited to handle them.

- The Commission is powerless to alter the local, community-based approach to cable franchising that Congress endorsed in the Cable Act. "It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs." H.R. Rep. No. 934, 98th Congress, 2d Sess. at 24.

- The NPRM's reliance on *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), for the proposition that the Commission's authority to administer Title VI includes the authority to interpret and implement § 621(a)(1) is misplaced. *Chicago* involved definitions set forth in § 621*(b)(1)*, not § 621*(a)(1)* and its prohibition on unreasonable refusal to award additional competitive franchises.

- Even if the Commission has authority to interpret or enforce § 621(a)(1) (which it does not), it would be, at most, concurrent jurisdiction with that of the courts. The Commission's interpretations of § 621(a)(1), therefore, would not be subject to the deferential standard of review as set forth in *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984). See, e.g., Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994).

- While cable operators are entitled to First Amendment protection, they are not free from government requirements and restrictions that serve important government purposes not related to the suppression of free expression. The Commission does not have the

power to find a provision – such as build-out requirements – of its governing Act to be unconstitutional. *See, e.g., Meredith Corp. v. FCC*, 809 F.2 d 863, 872 (D.C. Cir. 1987). The courts are the proper forum for seeking such relief.

B. There Is No Credible Evidence That LFAs Have Unreasonably Refused To Grant Competitive Franchises.

- LFAs welcome competition and are eager to issue additional franchises. Local franchising decisions are made by elected city councils and county commissions that must be responsive to the preferences of their constituents or face adverse consequences at the ballot box -- a far more powerful check on unreasonable refusals to award competitive franchises than any FCC oversight could produce. Indeed, the NPRM recognizes that a large number of competitive franchises have been secured over the past decade.

- Since its enactment nearly fourteen years ago, there is a dearth of reported precedent regarding § 621(a)(1), and especially its "unreasonable refusal" provision, a fact that, in and of itself, suggests "unreasonable refusals" by LFAs rarely, if ever, occur. There have been only five reported cases involving claims that an LFA violated § 621(a)(1)'s "unreasonable refusal" provision. And while a violation was found in two cases, the franchise application was not denied in either case. *See NEPSK, Inc. v. Town of Houston*, 167 F.Supp.2d 98 (D. Maine 2001), *aff'd*, 283 F.3d 1 (1st Cir. 2002); *Qwest Broadband Services v. City of Boulder*, 151 F.Supp. 2d 1236 (D. Colo. 2001); *Knology, Inc. v. Insight Communications Co., L.P.*, 2001 WL 1750839 (W.D. Ky. March 20, 2001); *Classic Communications, Inc. v. Rural Telephone Service Co., Inc.*, 956 F.Supp. 896 (D. Kan. 1996); and *Liberty Cable v. City of New York*, 893 F.Supp. 191 (S.D.N.Y. 1995).

- The NPRM appears to be triggered in large part by RBOC complaints regarding supposed difficulties they have encountered in the local franchising process. However, these complaints of delay of entry to the video marketplace are built on mischaracterizations. While the 1996 Act repealed the telephone-cable cross-ownership prohibition and gave the RBOCs four different means to enter the multichannel video market, the RBOCs made no serious effort to enter the market. Rather, RBOCs, such as Verizon and AT&T, did not enter the cable market for nearly a decade because of their own business decisions, not because of any delays allegedly caused by the LFAs. Section 621(a)(1) is not, and should not be, a means for ameliorating the consequences of the RBOCs' own business decisions.

- Industry complaints about the local franchising process essentially fall into two categories: namely, the process supposedly "takes too long," and some LFAs allegedly make "outrageous demands." Among the "outrageous demands" cited by the industry are those involving build-out requirements, and PEG access channel and institutional network (I-Net) support – all requirements specifically sanctioned by the Cable Act.

- Build-out requirements, which vary from community to community, are essential if the Cable Act's goals are to be observed. They contain density limitations and a reasonable period of time for system build-out. The NRPM acknowledges that it is "not unreasonable" for an LFA, when awarding a competitive franchise, to assure that cable access is not denied to any group of community residents, and to permit a reasonable period of time during which the cable system may become capable of providing service to all households in the franchise area. That is all build-out requirements do.

- PEG and I-Net requirements are among the most vital local community cable-related needs and interests that the Cable Act was designed to preserve and protect and are, by their nature, community-specific. Like build-out, the NPRM states that it is "not unreasonable" for an LFA, when awarding a competitive franchise, to require that the operator provide adequate capacity, facilities, or financial support for PEG and I-Net services. Again, that is precisely what the PEG and I-Net requirements do.

C. IPTV Is A "Cable Service."

- AT&T and Cincinnati Bell assert that their Internet Protocol-based video service ("IPTV") is not a "cable service" within the meaning of § 622(6). But these arguments should be disregarded by the Commission. To provide adequate notice of a ruling on this topic, the Commission would have to initiate another proceeding with proper notification to permit interested parties to file comments to help ensure meaningful public participation. But in any event, AT&T's and Cincinnati Bell's "IPTV" argument is simply wrong. IPTV services are a "cable service" under the current Cable Act and are fully subject to Title VI requirements. *See, e.g.*, NCTA *ex parte* letter and memorandum, WC Docket No. 04-36 (filed July 29, 2005) ("NCTA Filing #1"); NCTA *ex parte* response to SBC paper, WC Docket No. 04-36 (filed November 1, 2005) ("NCTA Filing #2"); and NCTA *ex parte* response to AT&T *ex parte* filings, WC Docket No. 04-36 and MB Docket No. 05-311 (filed July 31, 2006). Furthermore, any additional argument that IPTV is not subject to Title VI is directly contrary to the Act's and the

Commission's guiding principles of competitive neutrality and non-discrimination. House Energy and Commerce Chairman Joe Barton (R-Texas) has characterized AT&T's argument as "stupido."

D. Build-out Requirements Are Necessary To Ensure Competition And Lower Consumer Prices.

- It has been reported that cable prices are approximately 15% lower in areas with wireline video competition. But competition occurs only when two or more companies compete for the same business. Without reasonable build-out requirements, many consumers will never see cable video service competition in their communities. New entrants will simply "cherry pick" those communities that promise the highest return on investment. In fact, AT&T has publicly stated that Project Lightspeed will be available to 90% of its "high-value" customers, but to less than 5% of its "low-value" neighborhoods.

  Further, without reasonable build-out requirements, predictions of lower consumer prices by the RBOCs and others, such as the Phoenix Center, are simply wrong. Their calculations assume universal build-out. In addition, according to Thomas Hazlett, who submitted a declaration in support of Verizon's comments in this proceeding, it is not the intent of the RBOCs to cut prices. Rather, "their intent is to make money on the deal."

E. The Telecom Industry's Proposed Rules Are Beyond The FCC's Authority To Adopt And Would Be Arbitrary And Capricious.

1. Section 621(a)(1) is limited to final LFA orders denying a franchise.

   - Title VI does not grant the Commission authority to become a "national franchising authority" or a national LFA "oversight board." Section 621(a)(1) provides that "any applicant whose application for a second franchise *has been denied by a final decision of the franchising authority may appeal such final decision* pursuant to Section 635 for failure to comply with this subsection." 47 U.S.C. § 541(a)(1) (emphasis added). Section 621(a)(1) cannot be construed by a disgruntled applicant to permit the challenge – either in court or at the Commission – of a "non-final" decision of an LFA.

2. Build-out requirements are specifically allowed by the Cable Act.

- Build-out requirements are not, and statutorily cannot be, a barrier to competitive franchises. As long as an LFA gives a competitive provider "a reasonable period of time to become capable of providing cable service to all households in the franchise area," § 621(a)(4)(A), the Cable Act shields build-out requirements from constituting an "unreasonable refusal" to grant a competitive franchise. Section 621(a)(4)(A) cannot plausibly be construed to *forbid* LFAs from requiring a build-out "to all households in the franchise area" if an LFA allows "a reasonable period of time" to do so.

- Verizon's assertion that a provider may define its own franchise area is contrary to the Cable Act and FCC precedent. To allow a provider to do so would undermine the entire local franchising process and, among other things, render meaningless the Act's anti-redlining, uniform rate and build-out provisions.

3. The FCC has no authority under the Cable Act to set deadlines on LFA franchising actions.

- Section 621(a)(1) does not provide the Commission with authority to set a timeframe within which an LFA must act on a competitive franchise application. Congress knows how to set an inflexible deadline when it wants one, as it did in § 617, where it imposed a statutory deadline of 120 days to act on a franchise transfer application. Section 621(a)(1) contains no such deadline. The absence of a similar deadline in § 621(a)(1) confirms that the Commission has no authority to set such a deadline.

- Given that a franchise transfer requires no negotiation of franchise terms, but rather simply the approval of a new franchise holder, it is not plausible to suggest that Congress contemplated that LFAs could negotiate new franchises in a shorter time than § 617's 120-day deadline for transfers.

- Furthermore, the establishment of an arbitrary deadline would create perverse incentives for both applicants and LFAs. A "deemed granted" provision would discourage good faith bargaining and encourage stonewalling by the applicant. Moreover, § 621(a)(1) clearly allows for a "reasonable" refusal. Yet, a "deemed granted" provision would require the granting of any franchise after the

deadline, no matter how reasonable a denial might be. Moreover, if this deadline had a "deemed granted" effect, it would force LFAs to cease negotiations and act unilaterally to meet the deadline; that, in turn, would only promote litigation. Imposing an artificial deadline on LFA decisions would also improperly transform the Commission into a national franchising authority, contrary to the Cable Act.

4. RBOC attacks on franchise application fees, cost reimbursement and PEG/I-NET requirements are contrary to the Cable Act.

   - RBOC arguments that the Commission should either prohibit or severely limit the ability of an LFA to assess a franchise application fee, acceptance fee, and application processing cost reimbursement requirements over and above the 5% percent franchise fee are contrary to the Cable Act, which exempts costs "incidental to the awarding or enforcing of the franchise" from the 5% fee cap.

   - RBOC attacks on PEG funding requirements are misguided. Section 622(g)(2)(C) exempts PEG capital support from the "franchise fee" definition.

   - I-Nets are provided by cable operators and are used by LFAs for a variety of communication purposes. They perform vital public safety and homeland security communications functions. Industry arguments that the Cable Act or the decision in *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999), prevents LFAs from requiring access to their "communications networks" for I-Net use as a condition for granting a cable franchise are wrong. *See* § 621(b)(3)(D), which exempts I-Nets from its general prohibition on LFAs requiring telecommunications services in a franchise.

5. RBOC pleas to nationalize customer service standards cannot be squared with the Cable Act.

   - The Cable Act and FCC rules specifically permit LFAs to establish and enforce customer service requirements that either exceed the FCC's standards or concern matters not addressed by those standards. The Cable Act gives the FCC no authority to impose uniform preemptive federal standards.

6. RBOC criticisms of level playing field requirements are unwarranted.

- Because only courts, not the Commission, can construe and enforce § 621(a)(1)'s "unreasonable refusal" requirement, the Commission has no authority to preempt level playing field requirements, many of which are state laws. Generally, these laws do not require identical treatment, but merely an assessment of whether a competitive franchise, taken as a whole, is more favorable or less burdensome than the incumbent's. *See, e.g., New England Cable Television Assn. v. Dept. of Public Utility Control*, 247 Conn. 95, 717 A.2d 1276 (1998). Little or no evidence has been provided to suggest that these laws have the draconian effect on new entrants RBOCs would have the Commission believe. Moreover, both Congress (in § 653) and the FCC (in its OVS rules) have accepted the need for comparability and competitive neutrality among landline video service providers.

7. Industry's proposed new rules are procedurally defective.

- Most of the various rules proposed by the telephone industry suffer from a procedural defect that must first be addressed and cured before the FCC can even consider, let alone take action on, them: None of RBOCs' detailed proposed preemptive rules are found anywhere in the NRPM. Therefore, the NPRM provides no public notice and opportunity for comment. Even if the Commission were inclined to adopt any of these RBOC proposals (and it should not be), the Commission would have to propose specific rules on these various topics in a further rulemaking and provide an opportunity for comment.

III. Rule Proponents Have Failed to Provide the "Empirical Data" and "Specific Examples" the NPRM Directed, and the Record in Fact Belies Their Assertion that the Local Franchising Process Slows or Deters Competitive Entry.

A. RBOC Criticisms Are Directed More At The Cable Act Itself, Which The FCC Cannot Change, Than At Specific LFA Actions Or Inactions.

- AT&T concedes as much (Comments at 2), arguing that new § 621(a)(1) rules are necessary even if "each of the nation's thousands of LFAs" acted "as quickly and reasonably as state and local laws allowed."

- This is an admission that what the RBOCs really seek is to amend the Cable Act – something the FCC cannot do in this proceeding. Their remedy, if any, lies with Congress, not the FCC.

B. RBOCs' And Their Allies' Examples Of Supposedly Unreasonable LFA Actions Or Requirements Are Miniscule Relative To The Number Of LFAs And Franchises, And Those Examples Are Anonymous, Hearsay-Based, And Inaccurate.

Even assuming that the FCC has any legal authority to adopt rules interpreting or implementing § 621(a)(1) (and the text, history, structure, and purpose of the relevant statutory provision are all inconsistent with the notion that the FCC possesses any such authority), the record shows that there is no evidentiary basis for FCC action.

1. The NPRM explicitly solicited "empirical data" and "concrete examples" regarding LFAs "unreasonably refusing" to award competitive franchises. But the RBOCs and their allies have provided no credible evidence of any genuine problem in the franchising process -- much less of a pervasive problem that requires the FCC's intervention. Considering the fact that the FCC estimates there are more than 30,000 LFAs in the United States, this lack of evidence of "unreasonable refusals" is striking, but not surprising. Indeed, rather than supporting the industry's position that there are problems with the current video franchising process, the evidence shows that providers are having great success in entering the marketplace.

   For example:

   According to a March 20, 2006 press release, Verizon has obtained video franchises covering approximately 1.3 million homes in California, Delaware, Florida, Maryland, Massachusetts, New York, Pennsylvania, Texas and Virginia. Furthermore, the company is currently negotiating for approximately 300 more franchises around the country. Indeed, since the end of March 2006, Verizon has obtained local video franchises in 42 communities – including 14 new franchises in the month of June 2006 alone. *See* NCTA *ex parte* letter, MB Docket No. 05-311 (filed July 27, 2006).

2. Over 250 LFAs from across the country filed comments demonstrating that the local franchising process is working well and is not a "barrier to entry" to those who wish to enter the cable business. LFAs made clear that they welcome additional competition and are committed to granting franchises to new entrants. Indeed, where applicants have sought competitive

franchises and negotiated in good faith with LFAs, they have received expeditious approval on very favorable terms.

For example:

In early 2006, more than 600 invitations and resolutions were sent by Michigan communities asking AT&T to sign local franchise agreements and compete fairly for cable television customers. The communities involved represented approximately 60% of the state's population.

Numerous LFAs – including Cincinnati, Ohio, Santa Rosa, California, Wilson, North Carolina, and St. Petersburg, Florida - have never been approached by anyone for a competitive franchise, and those that have solicited RBOCs for competitive franchises have been rebuffed. And many jurisdictions, including El Cerrito, California, Cincinnati, Lincoln, Nebraska, and Durham, North Carolina have mechanisms in place that offer the same or comparable terms to a competitor upon request.

In 1996, the City of San Jose, California was approached by Pacific Bell, which requested a competitive video franchise. The franchise, the terms of which were very similar to the incumbent's, was granted in a matter of months. Unfortunately, Pacific Bell abandoned their franchise prior to completion due to a change in the company's business plan.

In 1998, the cities of Henderson, Las Vegas, North Las Vegas and Boulder City, along with Clark County, Nevada, worked with their cable operator to simultaneously issue franchises. This permitted the operator to quickly obtain nearly identical franchises, covering a large region, while allowing each community to individually tailor its franchise to its own unique needs.

Due to subscriber complaints, the City of Saint Charles, Missouri actively sought out competitors who could provide an alternative to the city's incumbent video providers. Despite repeated attempts by city staff and elected officials over a 12-month period, there was no positive response.

3. Claims by RBOCs and their allies of unreasonable treatment at the hands of LFAs are vague, unsubstantiated, not credible, or stale. The RBOCs present numerous claims regarding the unreasonable demands allegedly made by *unnamed* LFAs in *unnamed* communities, thereby making it impossible to test the veracity of those claims. In the relatively few instances where the RBOCs do identify specific LFAs, they mainly discuss situations that occurred

years ago, or claims that are contrary to *current* evidence of the telcos' widespread success in acquiring franchises. (And, even in those decade-old examples the telcos do cite, they generally were able to acquire franchises, including many which they, for their own reasons, chose not to use.

For example:

Qwest complained of its difficulties in obtaining franchises in the Denver metropolitan area during 2002-2004, stating that at the current rate of negotiations, it would take "at least six more years to cover the complete footprint" of the Denver market. In a subsequent *ex parte* notice, the company acknowledged that it "did not aggressively pursue franchises" in the Denver metropolitan area during that time period.

Verizon stated in its comments that the City of Tampa demanded $13.5 million as a condition for the granting of a cable television franchise. This same allegation was subsequently raised by the Fiber-to-the-Home Council in its *ex parte* meeting with Commission staff. However, the FTTH Council failed to acknowledge that Verizon's allegation was refuted by the City of Tampa and was the subject of Errata filed by Verizon on March 6, 2006. *See* Verizon Comments, at 65; City of Tampa Reply Comments, at 1; Verizon *Errata*, MB Docket 05-311 (Mar. 6, 2006).

4. The record clearly demonstrates that the RBOCs' difficulties in obtaining franchises are primarily of their own making. AT&T, for example, has not applied for a single cable franchise, while BellSouth has not applied for one since the mid-1990s; obviously, neither has been "unreasonably refused" by a single LFA.

5. Where the RBOCs have, in fact, applied for cable franchises, LFAs have generally approved those applications in a timely fashion. To the extent there have been any delays in the approval process, such delays have been caused by the RBOCs' own behavior: making unreasonable demands, refusing to negotiate in good faith, unilaterally insisting on the RBOC's own "form" franchise, and generally refusing to satisfy *local* community cable-related needs and interests, as the Cable Act requires.

6. RBOCs' claims that the franchising process is too slow or cumbersome are further weakened by evidence that they are obtaining franchises faster than they can deploy service. The record reflects numerous situations where the telcos have all the

legal authority necessary to provide cable service, but nonetheless are failing to do so.

For example:

According to a March 20, 2006 press release, Verizon has obtained video franchises covering approximately 1.3 million homes in California, Delaware, Florida, Maryland, Massachusetts, New York, Pennsylvania, Texas and Virginia. In addition, the company has stated that 300,000 Virginia households will be capable of receiving FiOS TV under its build-out plan. The company also recently announced new franchise agreements in Montgomery, Hatfield, Collegeville, Skippack, and Lower Gwynedd, Pennsylvania. All of the communities are part of consortium of 30 Montgomery County communities that is recommending that each community approve a cable franchise with Verizon. There are approximately 225,000 households in the municipalities making up the consortium.

Verizon is currently negotiating approximately 300 more franchises around the country. It has reached penetration levels of 9 to 12 percent in Florida, Texas and Virginia, representing nearly half its goal of 20 to 25 percent penetration in five years.

In April 2000, representatives of Wide Open West ("WOW") contacted Kansas City, Missouri to discuss overbuilding the Time Warner Cable system. WOW was offered a franchise on the same terms and conditions as a recently awarded franchise. On May 10, 2000, after receiving written confirmation of the company's intent to enter the market, WOW sent the city another letter in which it stated that it would not enter into an agreement because the company had decided that it would not enter a market where it could not be the first or only overbuilder. Thus, while the franchising process could have been completed in two weeks, WOW made a business decision not to enter the Kansas City market.

7. RBOCs and their allies have also failed to prove that build-out requirements are an impediment to entry. Indeed, Verizon admits that it is agreeing to build-out requirements. Moreover, LFAs are bending over backwards to make build-out as telco-friendly as possible, such as by relieving the telcos of build-out obligations in low-density areas and providing the telcos a significant period of years to complete build-out.

For example:

In May 2006, a Denver area advisory group – the Greater Metro Telecommunications Consortium – approved Qwest's model franchise agreement, eliminating many of the issues that arise during the negotiation process. The agreement does not mandate a build-out provision.

Salt Lake City recently granted a video franchise to Qwest over the objections of the incumbent provider, Comcast. Comcast had wanted the city to impose a build-out period of three to five years. However, the city agreed not to compel a complete build-out of the community unless and until Qwest penetrates 51% of the market.

In 2000, the City of Fort Worth, Texas granted a citywide franchise to WOW. However, construction was delayed due to the stock market turndown in the early 2000's. In an effort to promote citywide video competition, the city granted WOW a five-year extension on the construction timeframe. The franchise was terminated in 2005 for failure to begin construction.

In Wheaton, Illinois, the city's franchise requires the cable system to pass and be capable of serving all residents and institutions existing on the effective date of the agreement. However, the city added a provision limiting build-out where there are 25 or less potential subscribers per linear mile.

Finally, it is difficult to see how build-out requirements could negatively impact AT&T since the company has publicly stated that it does not intend to offer its Project Lightspeed service to all potential customers. As reported by USA Today, "SBC (now AT&T) said it planned to focus almost exclusively on affluent neighborhoods. SBC broke out its deployment plans by customer spending levels: It boasted that Lightspeed would be available to 90% of its 'high-value' customers – those who spend $160 to $200 a month on telecom and entertainment services – and 70% of its 'medium-value' customers, who spend $110 to $160 a month. SBC noted that less than 5% of Lightspeed's deployment would be in 'low-value' neighborhoods – places where people spend less than $110 a month."

IV. Conclusion

The Commission should acknowledge that there is no credible evidence that LFAs have unreasonably refused to grant additional competitive franchises. Further, the Commission should disregard and ignore any industry comments that

do not set forth empirical data or specific examples of abuses of the local franchising process. Because the Commission does not have the authority to construe or enforce § 621(a)(1), it should reject calls to adopt franchising "rules" and leave that task to Congress.

November 17, 2006

VIA ELECTRONIC COMMENT FILING SYSTEM (ECFS)

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Protection and Competition Act of 1992, MB Docket No. 05-311

Dear Ms. Dortch:

The National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), the United States Conference of Mayors ("USCM"), the National Association of Counties ("NACo"), the Alliance for Community Media ("ACM"), and the Alliance for Communications Democracy ("ACD"), submit this letter in response to the October 18, 2006, letter filed by BellSouth Corporation ("BellSouth") in this docket in which it raises objections to our *ex parte* filing of September 19, 2006.

We would like to emphasize that we stand by our legal analysis concerning the Commission's lack of authority to adopt rules to implement or enforce Section 621(a)(1) and Section 621(a)(4)(A)'s preservation of the ability of local franchising authorities ("LFAs") to impose reasonable buildout requirements as fully set forth in our Comments, Reply Comments, and *ex parte* filings. These same legal positions are echoed in numerous other filings in this docket by representatives of the cable industry and LFAs from across the country. However, because BellSouth continues to cling to its misreading of Sections 621(a)(1) and 635(a) and its misguided musings on reasonable buildout requirements under Section 621(a)(4)(A), we file this response to BellSouth's letter to set the record straight.

Commission Authority

As AT&T acknowledged in its filed comments, Section 621(a)(1) does not expressly grant authority to the Commission to regulate the local franchising process. And BellSouth makes no

such argument here. Indeed, BellSouth fails to cite any Commission or court decision that addresses the specific issue of Commission authority to interpret or enforce Section 621(a)(1), much less any authority construing the explicit statutory link between Sections 635(a) and 621(a)(1). Read together, Sections 621(a)(1) and 635(a) clearly vest the courts – not the Commission – with exclusive jurisdiction over Section 621(a)(1). Any other reading writes Section 635(a), and Section 621(a)(1)'s reference to Section 635(a), out of the statute.

It is BellSouth, not we, that has no meaningful response to our position that Section 635(a) gives courts exclusive jurisdiction over Section 621(a)(1). BellSouth seeks shelter in the Seventh Circuit's *Chicago* decision,[1] but it will find no solace there. Try as it might, BellSouth cannot twist *Chicago* into supporting its position. BellSouth does not, and cannot, claim that *Chicago* had anything at all to do with Section 621(a)(1)'s "unreasonable refusal" provision. In fact, *Chicago* mentions Section 621 (or, to be more precise, "47 U.S.C. § 541," Section 621's U.S. Code denomination) only in a single paragraph and *only* in the context of the Commission's authority "to determine what systems are exempt from franchising requirements." 199 F.3d at 428. Section 621(a)(1), of course, has nothing to do with whether a system is exempt from franchising requirements. That matter is found in Section 621*(b)(1)*, which provides that "a cable operator may not provide cable service without a franchise." The Seventh Circuit in *Chicago* was simply not addressing Section 621(a)(1) at all. And it certainly was not considering, nor even mentioning, Section 635(a), which explicitly singles out Section 621(a)(1) from the balance of Section 621 for special treatment.

The "legal authority" for our position is hardly uncited; it is right under BellSouth's nose: Section 635(a) itself, and the specific reference to Section 635(a) in Section 621(a)(1). BellSouth's position that the Commission is free to construe or enforce Section 621(a)(1) just as it is any other provision of the Communications Act, or of Title VI, would empty Section 635(a) of all meaning. If, as BellSouth seems to believe, Section 635(a) merely gives courts concurrent jurisdiction with the Commission to interpret and enforce Section 621(a)(1), then Section 635(a) would do nothing at all, since the law is clear that courts already have such concurrent jurisdiction over several other provisions in Title VI that are not listed in Section 635(a).[2] BellSouth's argument would render Section 635(a) a dead letter, which the Commission is not at liberty to do.

BellSouth's strained effort to rewrite Sections 621(a)(1) and 635(a) to accord with the interconnection provisions of Sections 251 and 252 fails for the rather obvious reason that Congress chose to word those provisions quite differently. Unlike the case with Sections 621(a)(1) and 635(a), Congress in Section 251(d) explicitly required the Commission to adopt rules governing (among other things) interconnection and then, in Section 252, gave State commissions authority to arbitrate and approve or reject interconnection agreements consistent with the Commission's Section 251(d) rules (*see* Section 252(b)(c)&(e)) and permitted aggrieved parties to seek court review of a State commission decision "to determine whether the [State

[1] *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999).
[2] Comments of NATOA *et al.*, MB Docket No. 05-311, at 9 (Feb. 13, 2006).

commission's action] meets the requirements of Section 251 and [Section 252]" (*see* Section 252(e)(6)). If Congress had intended Section 635(a) court review to be tied to, and limited by, Commission rules under Section 621(a)(1), it would have said so like it did in Sections 251 and 252, but it did not. BellSouth's invitation to rewrite Sections 621(a)(1) and 635(a) to read like Sections 251 and 252 flies in the face of Congress' radically different language in both sets of sections.

BellSouth's assertion that § 621(a)(1)'s "unreasonable refusal" language is ambiguous for *Chevron* purposes is likewise misguided. As an initial matter, Section 621(a)(1)'s explicit reference to Section 635(a) court review is quite unambiguous. Moreover, BellSouth closes its eyes to the obvious common denominator of the three Title VI provisions – "unreasonable refusals" under Section 621(a)(1), denials of franchise modification requests under Section 625, and denials of franchise renewals under Section 626 – that Section 635(a) singles out for court jurisdiction. Congress explicitly assigned responsibility for construing and enforcing these three provisions to courts rather than the Commission because the LFA decisions that each involves are inherently fact-specific; they will vary significantly in every case. Unlike the fact-specific litigation process of the courts, the Commission is peculiarly ill-suited to such a case-specific process of finding and applying unique facts to statutory language. The complexity of disputes involving Sections 621(a)(1), 625 and 626 has nothing to do with any ambiguity in the statutory language but stems instead from the inherent variability of the facts in every case and of the resulting task of applying unique sets of facts to the statutory language. And that is precisely why Congress wisely and explicitly singled out Section 621(a)(1) (along with Sections 625 and 626) and assigned jurisdiction over them to the courts rather than the Commission.

Similarly misguided is BellSouth's attack on our argument that, even if the Commission had jurisdiction over Section 621(a)(1), its jurisdiction would clearly be concurrent with the courts and thus no *Chevron* deference would be owed to the Commission's interpretations of Section 621(a)(1). The problem with BellSouth's position is that it would, once again, gut Section 635(a). The jurisdiction to hear and resolve Section 621(a)(1) disputes that Congress went out of its way to give explicitly to courts under Section 635(a) would be frustrated, if not completely eviscerated, if the Commission were free to dictate the outcome of Section 621(a)(1) court cases through *Chevron*-protected pronouncements about Section 621(a)(1). An example will prove the point. If, as BellSouth and its allies contend, the Commission were free to adopt *Chevron*-protected rules placing a deadline on LFA action on competitive franchise applications or prohibiting the imposition of any buildout requirements on competitive franchise applicants, then courts in Section 621(a)(1) disputes would be denied the ability to consider the facts of such disputes, such as whether any delay was the result of the applicant's, rather than the LFA's, recalcitrance, or whether the specific buildout requirement that a particular LFA sought to impose on a particular applicant actually would have any adverse effects on competitive entry. If Congress really had intended to give the Commission jurisdiction to adopt such "one-size-fits-all" rules about Section 621(a)(1), then Section 621(a)(1)'s and Section 635(a)'s explicit references to one another make no sense at all.

Buildout

BellSouth's Section 621(a)(4)(A) argument rests entirely on mischaracterization of what both Section 621(a)(4)(A) and the *Americable* decisions[3] say. The relevant question is *not*, as BellSouth seems to think, whether Section 621(a)(4)(A) *requires* an LFA to impose a buildout requirement "to all households." Rather, the question is whether Section 621(a)(4)(A) specifically *allows* an LFA to impose a buildout requirement "to all households" if it wishes, as long as the LFA gives the operator "a reasonable time" to do so. There is simply no plausible way to read Section 621(a)(4)(A) other than to conclude that it does allow an LFA, if it wishes, to impose buildout requirements "to all households," as long as the LFA provides the operator with a reasonable time to complete the buildout. Any Commission rule prohibiting LFAs from imposing buildout requirements on competitive franchise applicants would therefore be flatly at odds with Section 621(a)(4)(A).

Stripped of BellSouth's obfuscation, the *Americable* decisions confirm this conclusion and thus support our, rather than BellSouth's, position. As BellSouth itself admits, *Americable* involved a claim by an incumbent cable operator that Section 621(a)(4)(A) mandated that the LFA (the Department of the Navy) impose a buildout requirement on a second, competitive cable operator, and that the LFA therefore violated Section 621(a)(4)(A) by not imposing such a requirement on the competitive cable operator. Both *Americable* decisions properly hold that Section 621(a)(4)(A) did not require the LFA to impose a buildout requirement. Thus, all *Americable* stands for is the proposition that Section 621(a)(4)(A) does not require an LFA to impose a buildout requirement if that is what the LFA prefers – a proposition we do not dispute, and indeed, we endorse. But nothing in *Americable* remotely supports BellSouth's contention that, had the LFA in that case chosen to give the competitor a reasonable amount of time to build out its system to serve "all households" in the area, Section 621(a)(1) or Section 621(a)(4)(A) would have prohibited that.

Americable's holding that Section 621(a)(4)(A) does not *require* an LFA to impose a buildout requirement is one thing. It is quite another to construe Section 621(a)(4)(A) (or Section 621(a)(1)) to *prohibit* an LFA from imposing such a requirement, even if the LFA satisfies its Section 621(a)(4)(A) obligation to "allow the operator a reasonable period of time to become capable of providing cable service to all households in the franchise area." That would turn Section 621(a)(4)(A) on its head, for it would mean that Section 621(a)(1) prohibits precisely what Section 621(a)(4)(A) allows.

What BellSouth studiously (and perhaps intentionally) ignores is that Section 621(a)(4)(A)'s plain language leaves to the LFA − *not* to the Commission, the courts, or an incumbent cable operator − the decision whether to impose a buildout requirement, as long as the LFA, if it chooses to impose such a requirement, allows the operator a reasonable period of time to comply with the buildout requirement. An LFA's Section 621(a)(4)(A) obligation to provide a

[3] *Americable International v. Dept. of Navy*, 931 F.Supp. 1 (D.D.C. 1996) ("*Americable I*"), *aff'd in part, rev'd in part*, 129 F.3d 1271 (D.C. Cir. 1998) ("*Americable II*").

reasonable time for buildout would be a nullity if, as BellSouth claims, the statute leaves the Commission free to prohibit LFAs from imposing any buildout requirements at all, regardless whether the LFA allows a "reasonable period of time" to complete the buildout.

That Section 621(a)(4)(A) cannot be read in the peculiar way BellSouth urges is further confirmed by the fact that Section 621(a)(4)(A) (indeed, all of Section 621(a)(4)) was added to Title VI at the same time that Section 621(a)(1) was – in the 1992 Cable Act. As a result, the *only* way to read Section 621(a)(1) and Section 621(a)(4)(A) together is to conclude that it is *not* an "unreasonable refusal" within the meaning of Section 621(a)(1) for an LFA to impose a requirement on a franchise applicant to serve all households in a franchise area, as long as the LFA complies with its Section 621(a)(4)(A) obligation by giving the applicant "a reasonable period of time" to do so.[4]

In the Notice itself, the Commission tentatively and correctly concluded that it is "not unreasonable" for an LFA to establish reasonable buildout requirements. BellSouth's protestations to the contrary notwithstanding, the statute allows no other conclusion.

State Franchising Laws

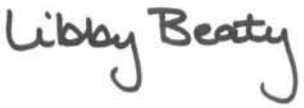
Finally, in an effort to ensure that the Commission has a full and complete record in the proceeding, we are submitting copies of legislation recently enacted by a number of states addressing video franchising. Each of these eight states – California, North Carolina, South Carolina, Indiana, Virginia, Texas, Kansas, and New Jersey – has recently approached this issue from different angles, each offering their own unique "take" on the franchising process.[5] Collectively, however, these new state laws effectively refute any claim by industry that there is a need for Commission action in this proceeding. Rather, they underscore that any Commission action would be unnecessary and counterproductive.

Pursuant to Commission rules, please include a copy of this notice in the record for the proceeding noted above.

[4] This also disposes of BellSouth's frivolous attempt to analogize telephone service buildout requirements under § 253 with cable service buildout requirements under §§ 621(a)(1) and § 621(a)(4)(A). The short answer is that § 253 contains no analog to § 621(a)(4)(A) stating that State commissions must allow new telecommunications service providers a reasonable time period to become capable of providing telecommunications service to all households in a State commission-determined telephone franchise area. If § 253 had such an analogous provision, the Commission's decision in *Public Utility Commission of Texas*, 13 FCC Rcd. 3460, 3498-99 (1997), would have had to have been quite different.

[5] An at-a-glance comparison of these state laws has been prepared and posted to the NATOA website at www.natoa.org.

Sincerely,



Libby Beaty
Executive Director, NATOA

/s/ Tillman L. Lay

Tillman L. Lay
Spiegel & McDiarmid

cc: Heather Dixon
Jessica Rosenworcel
Rudy Brioche
Christina Chou Pauze
Rosemary Harold
Holly Sauer
John Norton
Geeta Kharkar
Brendan Murray
Julie Veach
Rene Crittenden

Attachments

AN ACT

relating to furthering competition in the communications industry.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 33.001, Utilities Code, is amended to read as follows:

Sec. 33.001. MUNICIPAL JURISDICTION. (a) To provide fair, just, and reasonable rates and adequate and efficient services, the governing body of a municipality has exclusive original jurisdiction over the rates, operations, and services of an electric utility in areas in the municipality, subject to the limitations imposed by this title.

(b) Notwithstanding Subsection (a), the governing body of a municipality shall not have jurisdiction over the BPL system, BPL services, telecommunications using BPL services, or the rates, operations, or services of the electric utility or transmission and distribution utility to the extent that such rates, operations, or services are related, wholly or partly, to the construction, maintenance, or operation of a BPL system used to provide BPL services to affiliated or unaffiliated entities.

SECTION 2. Subtitle B, Title 2, Utilities Code, is amended by adding Chapter 43 to read as follows:

CHAPTER 43. USE OF ELECTRIC DELIVERY SYSTEM FOR ACCESS TO BROADBAND AND OTHER ENHANCED SERVICES, INCLUDING COMMUNICATIONS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 43.001. LEGISLATIVE FINDINGS. (a) The legislature finds that broadband over power lines, also known as BPL, is an emerging technology platform that offers a means of providing broadband services to reach homes and businesses. BPL services can also be used to enhance existing electric delivery systems, which can result in improved service and reliability for electric customers.

(b) The legislature finds that access to quality, high speed broadband services is important to this state. BPL deployment in Texas has the potential to extend broadband service to customers where broadband access is currently not available and may provide an additional option for existing broadband consumers in Texas, resulting in a more competitive market for broadband services. The legislature further finds that BPL development in Texas is fully dependent upon the participation of electric utilities in this state that own and operate power lines and related facilities that are necessary for the construction of BPL systems and the provision of BPL services.

(c) Consistent with the goal of increasing options for telecommunications in this state, the legislature finds that it is in the public interest to encourage the deployment of BPL by permitting affiliates of the electric utility, or permitting unaffiliated entities, to own or operate all or a portion of such BPL systems. The purpose of this chapter is to provide the

appropriate framework to support the deployment of BPL.

(d) The legislature finds that an electric utility may choose to implement BPL under the procedures set forth in this chapter, but is not required to do so. The electric utility shall have the right to decide, in its sole discretion, whether to implement BPL and may not be penalized for deciding to implement or not to implement BPL.

Sec. 43.002. APPLICABILITY. (a) This chapter applies to an electric utility whether or not the electric utility is offering customer choice under Chapter 39.

(b) If there is a conflict between the specific provisions of this chapter and any other provisions of this title, the provisions of this chapter control.

(c) No provision of this title shall impose an obligation on an electric utility to implement BPL, to provide broadband services, or to allow others to install BPL facilities or use the electric utility's facilities for the provision of broadband services.

Sec. 43.003. DEFINITIONS. In this chapter:

(1) "BPL," "broadband over power lines," and "BPL services" mean the provision of broadband services over electric power lines and related facilities, whether above ground or in underground conduit.

(2) "BPL access" means the ability to access broadband services via a BPL operator or BPL Internet service provider.

(3) "BPL operator" means an entity that owns or operates a BPL system on the electric power lines and related

facilities of an electric utility.

(4) "BPL Internet service provider" and "BPL ISP" mean an entity that provides Internet services to others on a wholesale basis or to end-use customers on a retail basis.

(5) "BPL system" means the materials, equipment, and other facilities installed on electric utility property to facilitate the provision of BPL services.

(6) "BPL electric utility applications" means services and technologies that are used and useful and designed to improve the operational performance and service reliability of an electric utility including, but not limited to, automated meter reading, real time system monitoring and meter control, remote service control, outage detection and restoration, predictive maintenance and diagnostics, and monitoring and enhancement of power quality.

(7) "Electric delivery system" means the power lines and related transmission and distribution facilities used by an electric utility to deliver electric energy.

(8) "Electric utility" shall include an electric utility and a transmission and distribution utility as defined in Section 31.002(6) or (19).

[Sections 43.004-43.050 reserved for expansion]

SUBCHAPTER B. DEVELOPMENT OF BPL SYSTEMS

Sec. 43.051. AUTHORIZATION FOR BPL SYSTEM. An affiliate of an electric utility or a person unaffiliated with an electric utility may own, construct, maintain, and operate a BPL system and provide BPL services on an electric utility's electric delivery

system consistent with the requirements of this chapter. Nothing in this chapter shall prohibit an entity defined in Section 11.003(9) from providing BPL service or owning and operating a BPL system. Nothing in this chapter shall prohibit an electric utility from providing construction or maintenance services to a BPL operator or BPL ISP provided that the costs of these services are properly accounted for between the electric utility and the BPL operator or BPL ISP.

Sec. 43.052. OWNERSHIP AND OPERATION OF BPL SYSTEM. (a) An electric utility may elect to:

(1) allow an affiliate to own or operate a BPL system on the utility's electric delivery system;

(2) allow an unaffiliated entity to own or operate a BPL system on the electric utility's electric delivery system; or

(3) allow an affiliate or unaffiliated entity to provide Internet service over a BPL system.

(b) The BPL operator and the electric utility shall determine what BPL Internet service providers may have access to broadband capacity on the BPL system.

Sec. 43.053. FEES AND CHARGES. (a) An electric utility that allows an affiliate or an unaffiliated entity to own a BPL system on the electric utility's electric delivery system shall charge the owner of the BPL system for the use of the electric utility's electric delivery system.

(b) An electric utility may pay a BPL owner, a BPL operator, or a BPL ISP for the use of the BPL system required to operate BPL utility applications.

(c) If all or part of a BPL system is installed on poles or other structures of a telecommunications utility as that term is defined in Section 51.002, the owner of the BPL system shall be required to pay the telecommunications utility an annual fee consistent with the usual and customary charges for access to the space occupied by that portion of the BPL system so installed.

(d) Notwithstanding Subsections (a)-(c):

(1) an electric utility may not charge an affiliate under this section an amount less than the electric utility would charge an unaffiliated entity for the same item or class of items;

(2) an electric utility may not pay an affiliate under this section an amount more than the affiliate would charge an unaffiliated entity for the same item or class of items; and

(3) an electric utility or an affiliate of an electric utility may not discriminate against a retail electric provider that is not affiliated with the utility in the terms or availability of BPL services.

Sec. 43.054. NO ADDITIONAL EASEMENTS OR CONSIDERATION REQUIRED. Because BPL systems provide benefits to electric delivery systems, the installation of a BPL system on an electric delivery system shall not require the electric utility or the owner of the BPL system or an entity defined in Section 11.003(9) to obtain or expand easements or other rights-of-way for the BPL system or to give additional consideration as a result of the installation or the operation of a BPL system. For purposes of this section, installation of a BPL system shall be deemed to be consistent with installation of an electric delivery system.

Sec. 43.055. RELIABILITY OF ELECTRIC SYSTEMS MAINTAINED. An electric utility that allows the installation and operation of a BPL system on its electric delivery system shall employ all reasonable measures to ensure that the operation of the BPL system does not interfere with or diminish the reliability of the utility's electric delivery system. Should a disruption in the provision of electric service occur, the electric utility shall be governed by the terms and conditions of the retail electric delivery service tariff. At all times, the provision of broadband services shall be secondary to the reliable provision of electric delivery services.

[Sections 43.056-43.100 reserved for expansion]

SUBCHAPTER C. IMPLEMENTATION OF BPL SYSTEM BY ELECTRIC UTILITY

Sec. 43.101. PARTICIPATION BY ELECTRIC UTILITY. (a) An electric utility, through an affiliate or through an unaffiliated entity, may elect to install and operate a BPL system on some or all of its electric delivery system in any part or all of its certificated service area.

(b) The installation, operation, and use of a BPL system and the provision of BPL services shall not be regulated by any state agency, a municipality, or local government other than as provided for in this chapter.

(c) The commission or a state or local government or a regulatory or quasi-governmental or a quasi-regulatory authority may not:

(1) require an electric utility, either through an

affiliate or an unaffiliated entity, to install a BPL system on its power lines or offer BPL services in all or any part of the electric utility's certificated service area;

(2) require an electric utility to allow others to install a BPL system on the utility's electric delivery system in any part or all of the electric utility's certificated service area; or

(3) prohibit an electric utility from having an affiliate or unaffiliated entity install a BPL system or offering BPL services in any part or all of the electric utility's certificated service area.

(d) If a municipality or local government is already collecting a charge or fee from the electric utility for the use of the public rights-of-way for the delivery of electricity to retail electric customers, the municipality or local government is prohibited from requiring a franchise or an amendment to a franchise or from requiring a charge, fee, or tax from any entity for use of the public rights-of-way for a BPL system.

(e) The state or a municipality may impose a charge on the provision of BPL services, but the charge may not be greater than the lowest charge that the state or municipality imposes on other providers of broadband services for use of the public rights-of-way in its respective jurisdiction.

Sec. 43.102. COST RECOVERY FOR DEPLOYMENT OF BPL AND UTILITY APPLICATIONS. (a) Where an electric utility permits the installation of a BPL system on its electric delivery system under Section 43.052(a), the electric utility's investment in that BPL

system to directly support the BPL electric utility applications and other BPL services consumed by the electric utility that are used and useful in providing electric utility service shall be eligible for inclusion in the electric utility's invested capital, and any fees or operating expenses that are reasonable and necessary shall be eligible for inclusion as operating expenses for purposes of any proceeding under Chapter 36. The invested capital and expenses described in this section must be allocated to the customer classes directly receiving the services.

(b) In any proceeding under Chapter 36, just and reasonable charges for the use of the electric utility's electric delivery system by a BPL owner or operator shall be limited to the usual and customary pole attachment charges paid to the electric utility for comparable space by cable television operators.

(c) The revenues of an affiliated BPL operator or an affiliated BPL ISP shall not be deemed the revenues of an electric utility for purposes of setting rates under Chapter 36.

[Sections 43.103-43.150 reserved for expansion]

SUBCHAPTER D. MISCELLANEOUS PROVISIONS

Sec. 43.151. AFFILIATES OF ELECTRIC UTILITY. (a) Subject to the limitations of this chapter, an electric utility may have a full or partial ownership interest in a BPL operator or a BPL ISP. Whether a BPL operator or a BPL ISP is an affiliate of the electric utility shall be determined under Section 11.003(2) or Section 11.006.

(b) Neither a BPL operator nor a BPL ISP shall be considered a "competitive affiliate" of an electric utility as that term is

defined in Section 39.157.

Sec. 43.152. COMPLIANCE WITH FEDERAL LAW. BPL operators shall comply with all applicable federal laws, including those protecting licensed spectrum users from interference by BPL systems. The operator of a radio frequency device shall be required to cease operating the device upon notification by a Federal Communications Commission or Public Utilities Commission representative that the device is causing harmful interference. Operation shall not resume until the condition causing the harmful interference has been corrected.

SECTION 3. Section 52.155, Utilities Code, is amended by amending Subsection (a) and adding Subsection (c) to read as follows:

(a) A telecommunications utility that holds a certificate of operating authority or a service provider certificate of operating authority may not charge a higher amount for originating or terminating intrastate switched access than the prevailing rates charged by the holder of the certificate of convenience and necessity or the holder of a certificate of operating authority issued under Chapter 65 in whose territory the call originated or terminated unless:

(1) the commission specifically approves the higher rate; or

(2) subject to commission review, the telecommunications utility establishes statewide average composite originating and terminating intrastate switched access rates based on a reasonable approximation of traffic originating and

terminating between all holders of certificates of convenience and necessity in this state.

(c) Notwithstanding Subsection (a), Chapter 65 governs the switched access rates of a company that holds a certificate of operating authority issued under Chapter 65.

SECTION 4. Subchapter D, Chapter 52, Utilities Code, is amended by adding Section 52.156 to read as follows:

Sec. 52.156. RETAIL RATES, TERMS, AND CONDITIONS. A telecommunications utility may not:

(1) establish a retail rate, term, or condition that is anticompetitive or unreasonably preferential, prejudicial, or discriminatory; or

(2) engage in predatory pricing or attempt to engage in predatory pricing.

SECTION 5. Section 54.202, Utilities Code, is amended by adding Subsection (c) to read as follows:

(c) This section may not be construed to prevent a municipally owned utility from providing to its energy customers, either directly or indirectly, any energy related service involving the transfer or receipt of information or data concerning the use, measurement, monitoring, or management of energy utility services provided by the municipally owned utility, including services such as load management or automated meter reading.

SECTION 6. Subsections (a), (b), and (c), Section 54.204, Utilities Code, are amended to read as follows:

(a) Notwithstanding Section 14.008, a municipality or a municipally owned utility may not discriminate against a

certificated telecommunications provider [~~telecommunications utility~~] regarding:

(1) the authorization or placement of a [~~telecommunications~~] facility in a public right-of-way;

(2) access to a building; or

(3) a municipal utility pole attachment rate or term[~~, to the extent not addressed by federal law~~].

(b) In granting consent, a franchise, or a permit for the use of a public street, alley, or right-of-way within its municipal boundaries, a municipality or municipally owned utility may not discriminate in favor of or against a certificated telecommunications provider [~~telecommunications utility that holds or has applied for a certificate of convenience and necessity, a certificate of operating authority, or a service provider certificate of operating authority~~] regarding:

(1) municipal utility pole attachment or underground conduit rates or terms[~~, to the extent not addressed by federal law~~]; or

(2) the authorization, placement, replacement, or removal of a [~~telecommunications~~] facility in a public right-of-way and the reasonable compensation for the authorization, placement, replacement, or removal regardless of whether the compensation is in the form of:

(A) money;

(B) services;

(C) use of facilities; or

(D) another kind of consideration.

(c) A municipality or a municipally owned [~~Notwithstanding Subsection (b)(1), a municipal~~] utility may not charge any entity, regardless of the nature of the services provided by that entity, a pole attachment rate or underground conduit rate that exceeds the fee the municipality or municipally owned utility would be permitted to charge under rules adopted by the Federal Communications Commission under 47 U.S.C. Section 224(e) if the municipality's or municipally owned utility's rates were regulated under federal law and the rules of the Federal Communications Commission. In addition, not later than September 1, 2006, a municipality or municipally owned utility shall charge a single, uniform pole attachment or underground conduit rate to all entities that are not affiliated with the municipality or municipally owned utility regardless of the services carried over the networks attached to the poles or underground conduit.

SECTION 7. Section 54.251, Utilities Code, is amended by amending Subsection (b) and adding Subsection (c) to read as follows:

(b) Except as specifically determined otherwise by the commission under this subchapter or Subchapter G, the holder of a certificate of convenience and necessity, or the holder of a certificate of operating authority issued under Chapter 65, for an area has the obligations of a provider of last resort regardless of whether another provider has a certificate of operating authority or service provider certificate of operating authority for that area.

(c) A certificate holder may meet the holder's provider of

last resort obligations using any available technology. Notwithstanding any provision of Chapter 56, the commission may adjust disbursements from the universal service fund to companies using technologies other than traditional wireline or landline technologies to meet provider of last resort obligations. As determined by the commission, the certificate holder shall meet minimum quality of service standards, including standards for 911 service, comparable to those established for traditional wireline or landline technologies and shall offer services at a price comparable to the monthly service charge for comparable services in that exchange or the provider's nearest exchange.

SECTION 8. Subchapter G, Chapter 54, Utilities Code, is amended by adding Section 54.3015 to read as follows:

Sec. 54.3015. APPLICABILITY OF SUBCHAPTER. This subchapter applies to a holder of a certificate of operating authority issued under Chapter 65 in the same manner and to the same extent this subchapter applies to a holder of a certificate of convenience and necessity.

SECTION 9. Section 55.015, Utilities Code, is amended by amending Subsections (a), (c), and (d) and adding Subsections (b-1), (d-1), and (d-2) to read as follows:

(a) The commission shall adopt rules prohibiting a certificated provider of local exchange telephone service [~~telecommunications provider~~] from discontinuing basic network services listed in Section 58.051 [~~local exchange telephone service~~] to a consumer who receives lifeline service because of nonpayment by the consumer of charges for other services billed by

the provider, including interexchange telecommunications [~~long distance~~] service.

(b-1) The commission shall adopt rules requiring certificated providers of local exchange telephone service to implement procedures to ensure that all consumers are clearly informed both orally and in writing of the existence of the lifeline service program when they request or initiate service or change service locations or providers. On or before June 1, 2006, the commission shall enter into a memorandum of understanding with the Health and Human Services Commission, and, to the maximum extent feasible, housing authorities in the principal cities of each metropolitan statistical area, to improve enrollment rates in the lifeline service program.

(c) A certificated provider of local exchange telephone service [~~telecommunications provider~~] may block a lifeline service participant's access to all interexchange telecommunications [~~long distance~~] service except toll-free numbers when the participant owes an outstanding amount for that service. The provider [~~telecommunications provider~~] shall remove the block without additional cost to the participant on payment of the outstanding amount.

(d) A certificated provider of local exchange telephone service [~~telecommunications provider~~] shall offer a consumer who applies for or receives lifeline service the option of blocking all toll calls or, if technically capable, placing a limit on the amount of toll calls. The provider may not charge the consumer an administrative charge or other additional amount for the blocking

service.

(d-1) A certificated provider of local exchange telephone service shall provide access to lifeline service to a customer whose income is not more than 150 percent of the applicable income level established by the federal poverty guidelines or in whose household resides a person who receives or has a child who receives:

(1) Medicaid;

(2) food stamps;

(3) Supplemental Security Income;

(4) federal public housing assistance;

(5) Low Income Home Energy Assistance Program (LIHEAP) assistance; or

(6) health benefits coverage under the state child health plan under Chapter 62, Health and Safety Code.

(d-2) A certificated provider of local exchange telephone service shall provide consumers who apply for or receive lifeline service access to available vertical services or custom calling features, including caller ID, call waiting, and call blocking, at the same price as other consumers. Lifeline discounts shall only apply to that portion of the bill that is for basic network service.

SECTION 10. Subchapter A, Chapter 55, Utilities Code, is amended by adding Section 55.017 to read as follows:

Sec. 55.017. IDENTIFICATION REQUIRED. (a) A representative of a telecommunications provider or a video or cable service provider that has an easement in or a right-of-way over or through real property must show proof of identification to the owner of the real property when entering the property if requested

by the owner.

(b) This section does not apply to regularly scheduled service readings or examinations.

SECTION 11. Subchapter H, Chapter 55, Utilities Code, is amended by adding Section 55.1735 to read as follows:

Sec. 55.1735. CHARGE FOR PAY PHONE ACCESS LINE. The charge or surcharge a local exchange company imposes for an access line used to provide pay telephone service in an exchange may not exceed the amount of the charge or surcharge the company imposes for an access line used for regular business purposes in that exchange.

SECTION 12. Section 56.021, Utilities Code, is amended to read as follows:

Sec. 56.021. UNIVERSAL SERVICE FUND ESTABLISHED. The commission shall adopt and enforce rules requiring local exchange companies to establish a universal service fund to:

(1) assist telecommunications providers in providing basic local telecommunications service at reasonable rates in high cost rural areas;

(2) reimburse the telecommunications carrier that provides the statewide telecommunications relay access service under Subchapter D;

(3) finance the specialized telecommunications assistance program established under Subchapter E;

(4) reimburse the department, the Texas Commission for the Deaf and Hard of Hearing, and the commission for costs incurred in implementing this chapter and Chapter 57;

(5) reimburse a telecommunications carrier providing

lifeline service as provided by 47 C.F.R. Part 54, Subpart E, as amended;

(6) finance the implementation and administration of an integrated eligibility process created under Section 17.007 for customer service discounts relating to telecommunications services, including outreach expenses the commission determines are reasonable and necessary;

(7) reimburse a designated provider under Subchapter F; [~~and~~]

(8) reimburse a successor utility under Subchapter G; and

(9) finance the program established under Subchapter H.

SECTION 13. Subsection (a), Section 56.025, Utilities Code, is amended to read as follows:

(a) In addition to the authority provided by Section 56.021, for each local exchange company that serves fewer than 31,000 [~~five million~~] access lines and each cooperative, the commission:

(1) may adopt a mechanism necessary to maintain reasonable rates for local exchange telephone service; and

(2) shall adopt rules to expand the universal service fund in the circumstances prescribed by this section.

SECTION 14. Section 56.026, Utilities Code, is amended by adding Subsection (e) to read as follows:

(e) This subsection and Subsections (c) and (d) expire August 31, 2007.

SECTION 15. Subchapter B, Chapter 56, Utilities Code, is

amended by adding Sections 56.029, 56.030, and 56.031 to read as follows:

Sec. 56.029. UNIVERSAL SERVICE FUND STUDY; ATTESTATION REQUIREMENT. (a) The commission shall conduct a review and evaluation of whether the universal service fund accomplishes the fund's purposes as prescribed by Section 56.021 and the commission's final orders issued in Docket No. 18515 and Docket No. 18516. The evaluation shall determine whether the fund's purposes have been sufficiently achieved, whether the fund should be abolished or phased out, whether the fund should be brought within the state treasury, and whether the entities receiving those funds are spending the money for its intended purposes. The evaluation must include a forward-looking, comprehensive assessment of the appropriate use of the money in the fund and the manner in which that money is collected and disbursed.

(b) Not later than January 1, 2006, the commission shall require telecommunications providers receiving disbursements under the universal service fund to provide to the commission the information that the commission determines is necessary to discharge the commission's duties under this section, including information necessary to review and evaluate how money is collected for the universal service fund and expended.

(c) Information provided under Subsection (b) is confidential and is not subject to disclosure under Chapter 552, Government Code.

(d) The commission may classify telecommunications providers as the commission considers appropriate for efficiency

and may permit providers to share the cost of developing information the commission determines is necessary to discharge the commission's responsibilities under this section.

(e) Not later than January 5, 2007, the commission shall deliver to the legislature a report for the legislature's revision and approval on the results of the review and evaluation. The report must:

(1) include recommendations that are consistent with the policies provided by this title;

(2) include the commission's assessment of the universal service fund, including:

(A) how the money in the fund should be collected;

(B) how the money in the fund should be disbursed and the purposes for which the money should be used by the telecommunications provider receiving the money; and

(C) any recommendations the commission has in relation to accountability for use of the money in the fund, including the usefulness of the attestation required by Subsection (g); and

(3) include recommendations that ensure that a telecommunications provider's support from the universal service fund for a geographic area is consistent with Section 56.021 and the commission's final orders issued in Docket No. 18515 and Docket No. 18516.

(f) The evaluation shall determine whether the fund's purposes have been sufficiently achieved, whether the fund should

be abolished or phased out, whether the fund should be brought within the state treasury, and whether the entities receiving those funds are spending the money for its intended purposes.

(g) Not later than December 31, 2005, each telecommunications provider receiving universal service fund money shall file with the commission an affidavit attesting that the money from the fund has been used in a manner that is consistent with the purposes provided by Section 56.021 and the commission's final orders issued in Docket No. 18515 and Docket No. 18516.

(h) In addition to the study required by this section, the commission shall compile information necessary to determine whether the current funding mechanism for the universal service fund will be adequate in the future to sustain the purposes for which the fund was created considering the development of new technologies that are not subject to the existing funding mechanism and the shift in jurisdictional control from this state to the federal government. The commission shall also review and make recommendations on any mechanisms adopted under Section 56.025. Not later than January 5, 2007, the commission shall deliver to the legislature a report on these issues. If the commission determines that the existing funding mechanism is not adequate, or proposes to change the manner or level of current funding, the commission must include recommendations for alternative funding and basic service pricing methods that will be adequate and are consistent with a policy of technology and competitive neutrality in the assessment of fees and other state-imposed economic burdens.

(i) This section expires September 1, 2007.

Sec. 56.030. AFFIDAVITS OF COMPLIANCE. On or before September 1 of each year, a telecommunications provider that receives disbursements from the universal service fund shall file with the commission an affidavit certifying that the telecommunications provider is in compliance with the requirements for receiving money from the universal service fund and requirements regarding the use of money from each universal service fund program for which the telecommunications provider receives disbursements.

Sec. 56.031. ADJUSTMENTS. The commission may revise the monthly per line support amounts to be made available from the Texas High Cost Universal Service Plan and from the Small and Rural Incumbent Local Exchange Company Universal Service Plan at any time after September 1, 2007, after notice and an opportunity for hearing. In determining appropriate monthly per line support amounts, the commission shall consider the adequacy of basic rates to support universal service.

SECTION 16. Subchapter B, Chapter 56, Utilities Code, is amended by adding Section 56.032 to read as follows:

Sec. 56.032. COMMISSION REVIEW AND EVALUATION OF DISTANCE LEARNING DISCOUNTS AND PRIVATE NETWORK SERVICES FOR CERTAIN ENTITIES. (a) On or before October 1, 2005, the commission shall initiate a study for the purpose of evaluating a new funding mechanism to provide financial support to all telecommunications utilities that provide discounts or private network services at prescribed rates to the entities identified in Subchapter B, Chapter 57, Subchapter G, Chapter 58, and Subchapter D, Chapter 59.

(b) The study must include an evaluation of alternative sources of funding such support, including utilizing federal E-rate funding, and an evaluation of alternative funding mechanisms that would result in support being made available to all telecommunications utilities on a nondiscriminatory basis and on a technology neutral basis in exchange for providing services at rates comparable to those preferred rates being paid by the entities identified under Subchapter B, Chapter 57, Subchapter G, Chapter 58, and Subchapter D, Chapter 59, provisions.

(c) The commission shall conduct necessary proceedings to evaluate the appropriate funding mechanism and the appropriate method for determining the amount of support to be made available to telecommunications utilities that provide discounts to entities listed in Subsection (b).

(d) On or before November 15, 2006, the commission shall issue a report to the speaker of the house of representatives and the lieutenant governor on the viability of establishing a new program or funding mechanism through which support shall be funded and disbursed in exchange for providing discounts to the entities listed in Subsection (b). The commission shall include in the report its findings regarding the cost of any new funding mechanism, the benefit of establishing a new program or funding mechanism, and any other relevant information the commission deems appropriate to assist the legislature in its review of discounts for distance learning and private network services.

(e) This section expires September 1, 2007.

SECTION 17. Chapter 56, Utilities Code, is amended by

adding Subchapter H to read as follows:

SUBCHAPTER H. AUDIO NEWSPAPER PROGRAM

Sec. 56.301. AUDIO NEWSPAPER ASSISTANCE PROGRAM. The commission by rule shall establish a program to provide from the universal service fund financial assistance for a free telephone service for blind and visually impaired persons that offers the text of newspapers using synthetic speech. The commission may adopt rules to implement the program.

SECTION 18. Section 58.051, Utilities Code, is amended by amending Subsection (a) and adding Subsections (a-1), (c), and (d) to read as follows:

(a) Unless reclassified under Section 58.024, the following services are basic network services:

(1) flat rate residential local exchange telephone service, including primary directory listings and the receipt of a directory and any applicable mileage or zone charges;

(2) residential tone dialing service;

(3) lifeline and tel-assistance service;

(4) service connection for basic residential services;

(5) direct inward dialing service for basic residential services;

(6) private pay telephone access service;

(7) call trap and trace service;

(8) access for all residential and business end users to 911 service provided by a local authority and access to dual party relay service;

(9) mandatory residential extended area service arrangements; and

(10) mandatory residential extended metropolitan service or other mandatory residential toll-free calling arrangements[~~; and~~

[~~(11) residential call waiting service~~].

(a-1) Notwithstanding Subsection (a) and Section 58.151, basic network services include residential caller identification services if the customer to whom the service is billed is at least 65 years of age.

(c) At the election of the affected incumbent local exchange company, the price for basic network service shall also include the fees and charges for any mandatory extended area service arrangements, mandatory expanded toll-free calling plans, and any other service included in the definition of basic network service.

(d) A nonpermanent expanded toll-free local calling service surcharge established by the commission to recover the costs of mandatory expanded toll-free local calling service:

(1) is considered a part of basic network service;

(2) may not be aggregated under Subsection (c); and

(3) continues to be transitioned in accordance with commission orders and substantive rules.

SECTION 19. Section 58.151, Utilities Code, is amended to read as follows:

Sec. 58.151. SERVICES INCLUDED. The following services are classified as nonbasic services:

(1) flat rate business local exchange telephone

service, including primary directory listings and the receipt of a directory, and any applicable mileage or zone charges, except that the prices for this service shall be capped until September 1, 2005, at the prices in effect on September 1, 1999;

(2) business tone dialing service, except that the prices for this service shall be capped until September 1, 2005, at the prices in effect on September 1, 1999;

(3) service connection for all business services, except that the prices for this service shall be capped until September 1, 2005, at the prices in effect on September 1, 1999;

(4) direct inward dialing for basic business services, except that the prices for this service shall be capped until September 1, 2005, at the prices in effect on September 1, 1999;

(5) "1-plus" intraLATA message toll services;

(6) 0+ and 0- operator services;

(7) call waiting, call forwarding, and custom calling, except that:

(A) residential call waiting service shall be classified as a basic network service until July 1, 2006; and

(B) for an electing company subject to Section 58.301, prices for residential call forwarding and other custom calling services shall be capped at the prices in effect on September 1, 1999, until the electing company implements the reduction in switched access rates described by Section 58.301(2);

(8) call return, caller identification, and call control options, except that, for an electing company subject to Section 58.301, prices for residential call return, caller

identification, and call control options shall be capped at the prices in effect on September 1, 1999, until the electing company implements the reduction in switched access rates described by Section 58.301(2);

(9) central office based PBX-type services;

(10) billing and collection services, including installment billing and late payment charges for customers of the electing company;

(11) integrated services digital network (ISDN) services, except that prices for Basic Rate Interface (BRI) ISDN services, which comprise up to two 64 Kbps B-channels and one 16 Kbps D-channel, shall be capped until September 1, 2005, at the prices in effect on September 1, 1999;

(12) new services;

(13) directory assistance services, except that an electing company shall provide to a residential customer the first three directory assistance inquiries in a monthly billing cycle at no charge until July 1, 2006;

(14) services described in the WATS tariff as the tariff existed on January 1, 1995;

(15) 800 and foreign exchange services;

(16) private line service;

(17) special access service;

(18) services from public pay telephones;

(19) paging services and mobile services (IMTS);

(20) 911 services provided to a local authority that are available from another provider;

(21) speed dialing;

(22) three-way calling; and

(23) all other services subject to the commission's jurisdiction that are not specifically classified as basic network services in Section 58.051, except that nothing in this section shall preclude a customer from subscribing to a local flat rate residential or business line for a computer modem or a facsimile machine.

SECTION 20. Subsection (a), Section 58.258, Utilities Code, is amended to read as follows:

(a) Notwithstanding the pricing flexibility authorized by this subtitle, an electing company's rates for private network services may not be increased [~~on or~~] before January 1, 2012 [~~the sixth anniversary of the company's date of election~~]. However, an electing company may increase a rate in accordance with the provisions of a customer specific contract.

SECTION 21. Subchapter G, Chapter 58, Utilities Code, is amended by adding Section 58.268 to read as follows:

Sec. 58.268. CONTINUATION OF OBLIGATION. Notwithstanding any other provision of this title, an electing company shall continue to comply with this subchapter until January 1, 2012, regardless of:

(1) the date the company elected under this chapter; or

(2) any action taken in relation to that company under Chapter 65.

SECTION 22. Subsection (a), Section 59.077, Utilities Code,

is amended to read as follows:

(a) Notwithstanding the pricing flexibility authorized by this subtitle, an electing company's rates for private network services may not be increased [~~on or~~] before January 1, 2012 [~~the sixth anniversary of the company's election date~~].

SECTION 23. Subchapter D, Chapter 59, Utilities Code, is amended by adding Section 59.083 to read as follows:

Sec. 59.083. CONTINUATION OF OBLIGATION. Notwithstanding any other provision of this title, an electing company shall continue to comply with this subchapter until January 1, 2012, regardless of:

(1) the date the company elected under this chapter; or

(2) any action taken in relation to that company under Chapter 65.

SECTION 24. Chapter 60, Utilities Code, is amended by adding Subchapter J to read as follows:

SUBCHAPTER J. WHOLESALE CODE OF CONDUCT

Sec. 60.201. STATEMENT OF POLICY. It is the policy of this state that providers of telecommunications services operate in a manner that is consistent with minimum standards to provide customers with continued competitive choices.

Sec. 60.202. APPLICABILITY OF SUBCHAPTER. A provision of this subchapter applies only to the extent the provision has not been preempted by federal law or a rule, regulation, or order of the Federal Communications Commission.

Sec. 60.203. MINIMUM SERVICE REQUIREMENTS. A

telecommunications provider may not unreasonably:

(1) discriminate against another provider by refusing access to an exchange;

(2) refuse or delay an interconnection to another provider;

(3) degrade the quality of access the telecommunications provider provides to another provider;

(4) impair the speed, quality, or efficiency of a line used by another provider;

(5) fail to fully disclose in a timely manner on request all available information necessary to design equipment that will meet the specifications of the network; or

(6) refuse or delay access by a person to another provider.

Sec. 60.204. INTERCONNECTION. A telecommunications provider shall provide interconnection with other telecommunications providers' networks for the transmission and routing of telephone exchange service and exchange access.

Sec. 60.205. NUMBER PORTABILITY. A telecommunications provider shall provide number portability in accordance with federal requirements.

Sec. 60.206. DUTY TO NEGOTIATE. A telecommunications provider shall negotiate in good faith the terms and conditions of any agreement.

Sec. 60.207. DIALING PARITY. (a) A telecommunications provider shall provide dialing parity to competing telecommunications providers of telephone exchange service and

telephone toll service.

(b) A telecommunications provider shall provide nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listings and may not delay that access unreasonably.

Sec. 60.208. ACCESS TO RIGHTS-OF-WAY. A telecommunications provider shall provide access to poles, ducts, conduits, and rights-of-way to competing providers of telecommunications service on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

Sec. 60.209. RECIPROCAL COMPENSATION. A telecommunications provider shall establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Sec. 60.210. ACCESS TO SERVICES. A telecommunications provider shall provide access to:

(1) 911 and E-911 service;

(2) directory assistance service to allow other telecommunications providers' customers to obtain telephone numbers; and

(3) operator call completion service.

SECTION 25. Subchapter A, Chapter 62, Utilities Code, is amended by adding Section 62.003 to read as follows:

Sec. 62.003. REQUIREMENTS RELATING TO AUDIO AND VIDEO PROGRAMMING. (a) This section applies only to a provider of advanced services or local exchange telephone service that has more than 500,000 access lines in service in this state and that delivers audio programming with localized content or video programming to

its subscribers in those service areas where such provider is not regulated as a cable system under federal law.

(b) Notwithstanding any other provision of this title, a provider of advanced services or local exchange telephone service shall provide subscribers access to the signals of the local broadcast television and radio stations licensed by the Federal Communications Commission to serve those subscribers over the air; provided with respect to low power television stations, this section shall only apply to those low power television stations that are "qualified low power stations" as defined in 47 U.S.C. Section 534(h)(2).

(c) To facilitate access by subscribers of a provider of advanced services or local exchange telephone service to the signals of local broadcast stations, a station either shall be granted mandatory carriage or may request retransmission consent with the provider.

(d) This title does not require a provider of advanced services or local exchange telephone service to provide a television or radio station valuable consideration in exchange for carriage.

(e) A provider of advanced services or local exchange telephone service shall transmit without degradation the signals a local broadcast station delivers to the provider. The transmission quality offered a broadcast station may not be lower than the quality made available to another broadcast station or video or audio programming source.

(f) A provider of advanced services or local exchange

telephone service that delivers audio or video programming to its subscribers may not:

(1) discriminate among broadcast stations or between broadcast stations on the one hand and programming providers on the other with respect to transmission of their signals, taking into account any consideration afforded a provider of advanced services or local exchange telephone service by any such programming provider or broadcast station; or

(2) delete, change, or alter a copyright identification transmitted as part of a broadcast station's signal.

(g) A provider of advanced services or local exchange telephone service that delivers audio or video programming shall be subject to any applicable network nonduplication or syndicated exclusivity rules promulgated by the Federal Communications Commission to the extent applicable to cable systems as defined by the commission.

(h) A provider of advanced services or local exchange telephone service that delivers audio or video programming to its subscribers shall include all programming providers in a subscriber programming guide, if any, that lists program schedules.

SECTION 26. Subtitle C, Title 2, Utilities Code, is amended by adding Chapter 65 to read as follows:

CHAPTER 65. DEREGULATION OF CERTAIN INCUMBENT LOCAL EXCHANGE COMPANY MARKETS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 65.001. STATEMENT OF POLICY. It is the policy of this state to provide for full rate and service competition in the

telecommunications market of this state so that customers may benefit from innovations in service quality and market-based pricing.

Sec. 65.002. DEFINITIONS. In this chapter:

(1) "Deregulated company" means an incumbent local exchange company for which all of the company's markets have been deregulated.

(2) "Market" means an exchange in which an incumbent local exchange company provides residential local exchange telephone service.

(3) "Regulated company" means an incumbent local exchange company for which none of the company's markets have been deregulated.

(4) "Stand-alone residential local exchange voice service" means:

(A) residential tone dialing service;

(B) services and functionalities supported under the lifeline program;

(C) access for all residential end users to 911 service provided by a local authority and access to dual party relay service;

(D) at the election of the incumbent local exchange company, mandatory residential extended area service arrangements, mandatory residential extended metropolitan service or other mandatory residential toll-free calling arrangements, mandatory expanded local calling service arrangements, or another service that a company is required under a tariff to provide to a

customer who subscribes or may subscribe to basic network services;

(E) flat rate residential local exchange telephone service delivered by landline, but only if the service is ordered and received independent of:

(i) a service classified as a nonbasic service under Section 58.151 or residential call waiting service;

(ii) a package of services that includes a service classified as a nonbasic service under Section 58.151; or

(iii) another flat rate residential local exchange service delivered by landline; and

(F) residential caller identification services if the customer to whom the service is billed is at least 65 years of age.

(5) "Transitioning company" means an incumbent local exchange company for which at least one, but not all, of the company's markets has been deregulated.

Sec. 65.003. COMMISSION AUTHORITY. (a) Notwithstanding any other provisions of this title, the commission has authority to implement and enforce this chapter.

(b) The commission may adopt rules and conduct proceedings necessary to administer and enforce this chapter, including rules to determine whether a market should remain regulated, should be deregulated, or should be reregulated.

Sec. 65.004. INFORMATION. (a) The commission may collect and compile information from all telecommunications providers as necessary to implement and enforce this chapter.

(b) The commission shall maintain the confidentiality of

information collected under this chapter that is claimed to be confidential for competitive purposes. Information that is claimed to be confidential is exempt from disclosure under Chapter 552, Government Code.

Sec. 65.005. CUSTOMER PROTECTION. This chapter does not affect a customer's right to complain to the commission regarding a telecommunications provider.

[Sections 65.006-65.050 reserved for expansion]

SUBCHAPTER B. DETERMINATION OF WHETHER MARKET SHOULD BE REGULATED

Sec. 65.051. MARKETS DEREGULATED. (a) Except as provided by Subsection (b), all markets of all incumbent local exchange companies are deregulated on January 1, 2006, unless the commission determines under Section 65.052(a) that a market or markets should remain regulated.

(b) A market of an incumbent local exchange company in which the population in the area included in the market is less than 30,000 is deregulated on January 1, 2007, unless the commission determines under Section 65.052(f) that the market should remain regulated.

Sec. 65.052. DETERMINATION OF WHETHER A MARKET SHOULD REMAIN REGULATED. (a) Except as provided by Subsection (f), the commission shall:

(1) determine whether each market of an incumbent local exchange company should remain regulated on and after January 1, 2006; and

(2) issue a final order classifying the company in accordance with this section effective January 1, 2006.

(b) In making a determination under Subsection (a), the commission may not determine that a market should remain regulated if:

(1) the population in the area included in the market is at least 100,000; or

(2) the population in the area included in the market is at least 30,000 but less than 100,000 and, in addition to the incumbent local exchange company, there are at least three competitors of which:

(A) at least one is a telecommunications provider that holds a certificate of operating authority or service provider certificate of operating authority and provides residential local exchange telephone service in the market;

(B) at least one is an entity providing residential telephone service in the market using facilities that the entity or its affiliate owns; and

(C) at least one is a provider in that market of commercial mobile service as defined by Section 332(d), Communications Act of 1934 (47 U.S.C. Section 151 et seq.), Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Pub. L. No. 103-66), that is not affiliated with the incumbent local exchange company.

(c) The commission shall issue an order classifying an incumbent local exchange company as a deregulated company that is subject to Subchapter C if:

(1) the company does not have any markets in which the population in the area included in the market is less than 30,000;

and

(2) the commission does not determine that a market of the company should remain regulated on and after January 1, 2006.

(d) Regardless of the population in the area included in an incumbent local exchange company's markets, the commission shall issue an order classifying the company as a transitioning company that is subject to Subchapter D if the commission determines that one or more, but not all, of the markets of the company should remain regulated on and after January 1, 2006.

(e) The commission shall issue an order classifying the company as a regulated company that is subject to the provisions of this title that applied to the company on September 1, 2005, if the commission determines that all of the markets of the company in which the population in each area included in the markets is at least 30,000 should remain regulated on and after January 1, 2006. This subsection does not affect the authority of a regulated company to elect under Chapter 58 or 59 after January 1, 2005, and to be regulated under the chapter under which the company elected.

(f) Not later than November 30, 2006, the commission shall determine whether a market of an incumbent local exchange company in which the population in the area included in the market is less than 30,000 should remain regulated on or after January 1, 2007. The commission by rule shall determine the market test to be applied in determining whether the market should remain regulated. If the commission does not determine that the market should remain regulated on or after January 1, 2007, and the deregulation of that market results in a transitioning or regulated company no longer

meeting the definition of a transitioning or regulated company, as appropriate, the commission shall issue an order reclassifying the company appropriately.

Sec. 65.053. INCUMBENT LOCAL EXCHANGE COMPANY MARKETS. (a) Notwithstanding Section 65.052, an incumbent local exchange company may elect to have all of the company's markets remain regulated on and after January 1, 2006.

(b) To make an election under Subsection (a), an incumbent local exchange company must file an affidavit with the commission making that election not later than December 1, 2005.

(c) If an incumbent local exchange company makes an election under this section, the commission shall issue an order classifying the company as a regulated company that is subject to the provisions of this title that applied to the company on September 1, 2005. This subsection does not affect the authority of a regulated company to elect under Chapter 58 or 59 after January 1, 2005, and to be regulated under the chapter under which the company elected.

Sec. 65.054. PETITION FOR DEREGULATION. (a) After July 1, 2007, a company may petition the commission to deregulate a market that the commission previously determined should remain regulated.

(b) If the commission deregulates a market under this section and the deregulation results in the transitioning or regulated company no longer meeting the definition of a transitioning or regulated company, as appropriate, the commission shall issue an order reclassifying the company appropriately.

Sec. 65.055. COMMISSION AUTHORITY TO REREGULATE CERTAIN MARKETS. (a) This section applies only to a market of an incumbent

local exchange company in which the population in the area included in the market is less than 100,000.

(b) The commission, on its own motion or on a complaint that the commission considers to have merit, may determine that a market that was previously deregulated should again be subject to regulation.

(c) The commission by rule shall prescribe the procedures and standards applicable to a determination under this section.

[Sections 65.056-65.100 reserved for expansion]

SUBCHAPTER C. DEREGULATED COMPANY

Sec. 65.101. ISSUANCE OF CERTIFICATE OF OPERATING AUTHORITY. (a) A deregulated company may petition the commission to relinquish the company's certificate of convenience and necessity and receive a certificate of operating authority.

(b) The commission shall issue the deregulated company a certificate of operating authority and rescind the deregulated company's certificate of convenience and necessity if the commission finds that all of the company's markets have been deregulated under Subchapter B.

Sec. 65.102. REQUIREMENTS. (a) A deregulated company that holds a certificate of operating authority issued under this subchapter is a nondominant carrier governed in the same manner as a holder of a certificate of operating authority issued under Chapter 54, except that the deregulated company:

(1) retains the obligations of a provider of last resort under Chapter 54;

(2) is subject to the following provisions in the same

manner as an incumbent local exchange company that is not deregulated:

(A) Sections 54.156, 54.158, and 54.159;

(B) Section 55.012; and

(C) Chapter 60; and

(3) may not increase the company's rates for stand-alone residential local exchange voice service before the date that the commission has the opportunity to revise the monthly per line support under the Texas High Cost Universal Service Plan pursuant to Section 56.031, regardless of whether the company is an electing company under Chapter 58.

(b) In each deregulated market, a deregulated company shall make available to all residential customers uniformly throughout that market the same price, terms, and conditions for all basic and non-basic services, consistent with any pricing flexibility available to such company on or before August 31, 2005.

[Sections 65.103-65.150 reserved for expansion]

SUBCHAPTER D. TRANSITIONING COMPANY

Sec. 65.151. PROVISIONS APPLICABLE TO TRANSITIONING COMPANY. A transitioning company is governed by this subchapter and the provisions of this title that applied to the company immediately before the date the company was classified as a transitioning company. If there is a conflict between this subchapter and the other applicable provisions of this title, this subchapter controls.

Sec. 65.152. GENERAL REQUIREMENTS. (a) A transitioning company may:

(1) exercise pricing flexibility in a market in the manner provided by Section 58.063 one day after providing an informational notice as required by that section; and

(2) introduce a new service in a market in the manner provided by Section 58.153 one day after providing an informational notice as required by that section.

(b) A transitioning company may not be required to comply with exchange-specific retail quality of service standards or reporting requirements in a market that is deregulated.

Sec. 65.153. RATE REQUIREMENTS. (a) In a market that remains regulated, a transitioning company shall price the company's retail services in accordance with the provisions that applied to that company immediately before the date the company was classified as a transitioning company.

(b) In a market that is deregulated, a transitioning company shall price the company's retail services as follows:

(1) for all services, other than basic local telecommunications service, at any price higher than the service's long run incremental cost; and

(2) for basic local telecommunications service, at any price higher than the lesser of the service's long run incremental cost or the tariffed price on the date that market was deregulated, provided that the company may not increase the company's rates for stand-alone residential local exchange voice service before the date that the commission has the opportunity to revise the monthly per line support under the Texas High Cost Universal Service Plan pursuant to Section 56.031, regardless of whether the company is an

electing company under Chapter 58.

(c) In each deregulated market, a transitioning company shall make available to all residential customers uniformly throughout that market the same price, terms, and conditions for all basic and non-basic services, consistent with any pricing flexibility available to such company on or before August 31, 2005.

(d) In any market, regardless of whether regulated or deregulated, the transitioning company may not:

(1) establish a retail rate, term, or condition that is anticompetitive or unreasonably preferential, prejudicial, or discriminatory;

(2) establish a retail rate for a basic or non-basic service in a deregulated market that is subsidized either directly or indirectly by a basic or non-basic service provided in an exchange that is not deregulated; or

(3) engage in predatory pricing or attempt to engage in predatory pricing.

(e) A rate that meets the pricing requirements in Subsection (b) shall be deemed compliant with Subsection (d)(2).

[Sections 65.154-65.200 reserved for expansion]

SUBCHAPTER E. REDUCTION OF SWITCHED ACCESS RATES

Sec. 65.201. REDUCTION OF SWITCHED ACCESS RATES BY DEREGULATED COMPANY. (a) On the date the last market of an incumbent local exchange company is deregulated, the company shall reduce both the company's originating and terminating per minute of use switched access rates in each market to parity with the company's respective federal originating and terminating per

minute of use switched access rates.

(b) After reducing the rates under Subsection (a), a deregulated company shall maintain parity with the company's federal originating and terminating per minute of use switched access rates. If the company's federal originating and terminating per minute of use switched access rates are changed, the company shall change the company's per minute of use switched access rates in each market as necessary to re-achieve parity with the company's federal originating and terminating per minute of use switched access rates.

Sec. 65.202. REDUCTION OF SWITCHED ACCESS RATES BY TRANSITIONING COMPANY WITH MORE THAN THREE MILLION ACCESS LINES. (a) Notwithstanding any other provision of this title, a transitioning company that has more than three million access lines in service in this state on January 1, 2006, shall:

(1) on July 1, 2006, reduce both the company's originating and terminating per minute of use switched access rates in each market by an amount equal to 33 percent of the difference in the rates in effect on June 30, 2006, and the company's respective federal originating and terminating per minute of use switched access rates;

(2) on July 1, 2007, reduce both the company's originating and terminating per minute of use switched access rates in each market by an amount equal to 33 percent of the difference in the rates in effect on June 30, 2006, and the company's respective federal originating and terminating per minute of use switched access rates; and

(3) on July 1, 2008, reduce both the company's originating and terminating per minute of use switched access rates in each market to parity with the company's respective federal originating and terminating per minute of use switched access rates.

(b) After reducing the rates under Subsection (a), a transitioning company shall maintain parity with the company's federal originating and terminating per minute of use switched access rates. If the company's federal originating and terminating per minute of use switched access rates are changed, the company shall change the company's per minute of use switched access rates in each market as necessary to re-achieve parity with the company's federal originating and terminating per minute of use switched access rates.

Sec. 65.203. REDUCTION OF SWITCHED ACCESS RATES BY CERTAIN TRANSITIONING COMPANIES WITH NOT MORE THAN THREE MILLION ACCESS LINES. (a) Notwithstanding any other provision of this title, a company that is classified as a transitioning company effective January 1, 2006, and that has not more than three million access lines in service in this state on that date shall reduce both the company's originating and terminating per minute of use switched access rates in each market in accordance with this section.

(b) On July 1, 2006, the transitioning company shall reduce both the company's originating and terminating per minute of use switched access rates in each market by an amount equal to the lesser of:

(1) 25 percent of the difference in the company's rates

in effect on June 30, 2006, and the company's respective federal originating and terminating per minute of use switched access rates in effect on that date; or

(2) an amount derived by multiplying that difference by a percentage derived by dividing the number of the company's markets that are not regulated on July 1, 2006, by the total number of the company's markets on December 30, 2005.

(c) On July 1, 2007, the transitioning company shall reduce both the company's originating and terminating per minute of use switched access rates in each market by an amount equal to the lesser of:

(1) 25 percent of the difference in the company's rates in effect on June 30, 2006, and the company's respective federal originating and terminating per minute of use switched access rates in effect on that date; or

(2) an amount derived by multiplying that difference by a percentage derived by dividing the number of the company's markets that were deregulated in the prior 12 months by the total number of the company's markets on December 30, 2005.

(d) On July 1, 2008, the transitioning company shall reduce both the company's originating and terminating per minute of use switched access rates in each market by an amount equal to the lesser of:

(1) 25 percent of the difference in the company's rates in effect on June 30, 2006, and the company's respective federal originating and terminating per minute of use switched access rates in effect on that date; or

(2) an amount derived by multiplying that difference by a percentage derived by dividing the number of the company's markets that were deregulated in the prior 12 months by the total number of the company's markets on December 30, 2005.

(e) On July 1, 2009, and each succeeding year thereafter on July 1, the transitioning company shall reduce both the company's originating and terminating per minute of use switched access rates in each market by an amount derived by multiplying the difference in the company's rates in effect on June 30, 2006, and the company's respective federal originating and terminating per minute of use switched access rates in effect on that date by a percentage derived by dividing the number of the company's markets that were deregulated in the prior 12 months by the total number of the company's markets on December 30, 2005, except that a transitioning company shall be required to reduce both the company's originating and terminating per minute of use switched access charges to parity with the company's respective federal originating and terminating per minute of use switched access charges if more than 75 percent of the transitioning company's markets are not regulated on July 1 of 2009 or any succeeding year.

(f) After reducing the rates under Subsection (e), a transitioning company shall maintain parity with the company's federal originating and terminating per minute of use switched access rates. If the company's federal originating and terminating per minute of use switched access rates are changed, the company shall change the company's per minute of use switched access rates in each market as necessary to re-achieve parity with the company's

federal originating and terminating per minute of use switched access rates.

Sec. 65.204. REDUCTION OF SWITCHED ACCESS RATES BY NEWLY DESIGNATED TRANSITIONING COMPANY. (a) Notwithstanding any other provision of this title, a company that is classified as a transitioning company after January 1, 2006, shall reduce both the company's originating and terminating per minute of use switched access rates in each market in accordance with this section.

(b) On the date the company is classified as a transitioning company, the company shall reduce both the company's originating and terminating per minute of use switched access rates in each market by an amount equal to the lesser of:

(1) 25 percent of the difference in the company's rates in effect on the day before the date the company was classified, and the company's respective federal originating and terminating per minute of use switched access rates in effect on that date; or

(2) an amount derived by multiplying that difference by a percentage derived by dividing the number of the company's markets that are not regulated on the date the company is classified as a transitioning company by the total number of the company's markets on December 30, 2005.

(c) On the first anniversary of the date the company is classified as a transitioning company, the company shall reduce both the company's originating and terminating per minute of use switched access rates in each market by an amount equal to the lesser of:

(1) 25 percent of the difference in the company's rates

in effect on the day before the date the company was classified, and the company's respective federal originating and terminating per minute of use switched access rates in effect on that date; or

(2) an amount derived by multiplying that difference by a percentage derived by dividing the number of the company's markets that were deregulated in the prior 12 months by the total number of the company's markets on December 30, 2005.

(d) On the second anniversary of the date the company is classified as a transitioning company, the company shall reduce both the company's originating and terminating per minute of use switched access rates in each market by an amount equal to the lesser of:

(1) 25 percent of the difference in the company's rates in effect on the day before the date the company was classified, and the company's respective federal originating and terminating per minute of use switched access rates in effect on that date; or

(2) an amount derived by multiplying that difference by a percentage derived by dividing the number of the company's markets that were deregulated in the prior 12 months by the total number of the company's markets on December 30, 2005.

(e) On the third anniversary of the date the company is classified as a transitioning company and each anniversary thereafter, the company shall reduce both the company's originating and terminating per minute of use switched access rates in each market by an amount derived by multiplying the difference in the company's rates in effect on the day before the date the company was classified as a transitioning company, and the company's respective

federal originating and terminating per minute of use switched access rates in effect on that date by a percentage derived by dividing the number of the company's markets that were deregulated in the prior 12 months by the total number of the company's markets on December 30, 2005, except that a transitioning company shall be required to reduce both the company's originating and terminating per minute of use switched access charges to parity with the company's respective federal originating and terminating per minute of use switched access charges if more than 75 percent of the transitioning company's markets are not regulated on July 1 of 2009 or any succeeding year.

(f) After reducing the rates under Subsection (e), a transitioning company shall maintain parity with the company's federal originating and terminating per minute of use switched access rates. If the company's federal originating and terminating per minute of use switched access rates are changed, the company shall change the company's per minute of use switched access rates in each market as necessary to re-achieve parity with the company's federal originating and terminating per minute of use switched access rates.

Sec. 65.205. MAINTENANCE OF REDUCTION OR PARITY. (a) After a deregulated or transitioning company reduces the company's rates under this subchapter, the company may not increase those rates above the applicable rates prescribed by this subchapter.

(b) If a transitioning company's federal per minute of use switched access rates are reduced, the company shall reduce the

company's per minute of use switched access rates to not more than the applicable rates prescribed by this subchapter.

(c) Notwithstanding Subsections (a) and (b), a deregulated or transitioning company may decrease the company's per minute of use switched access rates to amounts that are less than the applicable rates prescribed by this subchapter.

[Sections 65.206-65.250 reserved for expansion]

SUBCHAPTER F. LEGISLATIVE OVERSIGHT COMMITTEE

Sec. 65.251. OVERSIGHT COMMITTEE. (a) In this subchapter, "committee" means the telecommunications competitiveness legislative oversight committee.

(b) The committee is composed of nine members as follows:

(1) the chair of the Senate Committee on Business and Commerce;

(2) the chair of the House Committee on Regulated Industries;

(3) three members of the senate appointed by the lieutenant governor;

(4) three members of the house of representatives appointed by the speaker of the house of representatives; and

(5) the chief executive of the Office of Public Utility Counsel.

(c) An appointed member of the committee serves at the pleasure of the appointing official.

Sec. 65.252. COMMITTEE DUTIES. (a) The committee shall conduct joint public hearings with the commission at least annually regarding the introduction of full competition to

telecommunications services in this state.

(b) The commission shall:

(1) collect and compile information from all telecommunications providers as necessary to conduct a hearing under this section; and

(2) maintain the confidentiality of information collected under this section that is claimed to be confidential for competitive purposes.

(c) Information that is claimed to be confidential under Subsection (b) is exempt from disclosure under Chapter 552, Government Code.

(d) The commission shall provide to the committee information regarding rules relating to telecommunications deregulation proposed by the commission. The committee may submit comments to the commission on those proposed rules.

(e) The committee shall monitor the effectiveness of telecommunications deregulation, including the fairness of rates, the quality of service, and the effect of regulation on the normal forces of competition.

(f) The committee may request reports and other information from the commission as necessary to carry out this subchapter.

(g) Not later than November 15 of each even-numbered year, the committee shall report to the governor, lieutenant governor, and speaker of the house of representatives on the committee's activities under this subchapter. The report must include:

(1) an analysis of any problems caused by telecommunications deregulation; and

(2) recommendations for any legislative action necessary to address those problems and to further competition within the telecommunications industry.

SECTION 27. Subtitle C, Title 2, Utilities Code, is amended by adding Chapter 66 to read as follows:

CHAPTER 66. STATE-ISSUED CABLE AND VIDEO FRANCHISE

Sec. 66.001. FRANCHISING AUTHORITY. The commission shall be designated as the franchising authority for a state-issued franchise for the provision of cable service or video service.

Sec. 66.002. DEFINITIONS. In this chapter:

(1) "Actual incremental cost" means only current out-of-pocket expenses for labor, equipment repair, equipment replacement, and tax expenses directly associated with the labor or the equipment of a service provider that is necessarily and directly used to provide what were, under a superseded franchise, in-kind services, exclusive of any profit or overhead such as depreciation, amortization, or administrative expense.

(2) "Cable service" is defined as set forth in 47 U.S.C. Section 522(6).

(3) "Cable service provider" means a person who provides cable service.

(4) "Communications network" means a component or facility that is, wholly or partly, physically located within a public right-of-way and that is used to provide video programming, cable, voice, or data services.

(5) "Franchise" means an initial authorization, or renewal of an authorization, issued by a franchising authority,

regardless of whether the authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, that authorizes the construction and operation of a cable or video services network in the public rights-of-way.

(6)(A) "Gross revenues" means all consideration of any kind or nature including without limitation cash, credits, property, and in-kind contributions (services or goods) derived by the holder of a state-issued certificate of franchise authority from the operation of the cable service provider's or the video service provider's network to provide cable service or video service within the municipality. Gross revenue shall include all consideration paid to the holder of a state-issued certificate of franchise authority and its affiliates (to the extent either is acting as a provider of a cable service or video service as authorized by this chapter), which shall include but not be limited to the following: (i) all fees charged to subscribers for any and all cable service or video service provided by the holder of a state-issued certificate of franchise authority; (ii) any fee imposed on the holder of a state-issued certificate of franchise authority by this chapter that is passed through and paid by subscribers (including without limitation the franchise fee set forth in this chapter); and (iii) compensation received by the holder of a state-issued certificate of franchise authority or its affiliates that is derived from the operation of the holder of a state-issued certificate of franchise authority's network to provide cable service or video service with respect to commissions

that are paid to the holder of a state-issued certificate of franchise authority as compensation for promotion or exhibition of any products or services on the holder of a state-issued certificate of franchise authority's network, such as a "home shopping" or a similar channel, subject to Paragraph (B)(v). Gross revenue includes a pro rata portion of all revenue derived by the holder of a state-issued certificate of franchise authority or its affiliates pursuant to compensation arrangements for advertising derived from the operation of the holder of a state-issued certificate of franchise authority's network to provide cable service or the video service within a municipality, subject to Paragraph (B)(iii). The allocation shall be based on the number of subscribers in the municipality divided by the total number of subscribers in relation to the relevant regional or national compensation arrangement. Advertising commissions paid to third parties shall not be netted against advertising revenue included in gross revenue. Revenue of an affiliate derived from the affiliate's provision of cable service or the video service shall be gross revenue to the extent the treatment of such revenue as revenue of the affiliate and not of the holder of a state-issued certificate of franchise authority has the effect (whether intentional or unintentional) of evading the payment of fees which would otherwise be paid to the municipality. In no event shall revenue of an affiliate be gross revenue to the holder of a state-issued certificate of franchise authority if such revenue is otherwise subject to fees to be paid to the municipality.

(B) For purposes of this section, "gross

revenues" does not include:

(i) any revenue not actually received, even if billed, such as bad debt;

(ii) non-cable services or non-video services revenues received by any affiliate or any other person in exchange for supplying goods or services used by the holder of a state-issued certificate of franchise authority to provide cable service or video service;

(iii) refunds, rebates, or discounts made to subscribers, leased access providers, advertisers, or a municipality;

(iv) any revenues from services classified as non-cable service or non-video service under federal law including without limitation revenue received from telecommunications services; revenue received from information services (but not excluding cable services or video services); and any other revenues attributed by the holder of a state-issued certificate of franchise authority to non-cable service or non-video service in accordance with Federal Communications Commission or commission rules, regulations, standards, or orders;

(v) any revenue paid by subscribers to home shopping programmers directly from the sale of merchandise through any home shopping channel offered as part of the cable services or video services, but not excluding any commissions that are paid to the holder of a state-issued certificate of franchise authority as compensation for promotion or exhibition of any products or services on the holder of a state-issued certificate of franchise

authority's network, such as a "home shopping" or a similar channel;

(vi) the sale of cable services or video services for resale in which the purchaser is required to collect this chapter's fees from the purchaser's customer. Nothing under this chapter is intended to limit state's rights pursuant to 47 U.S.C. Section 542(h);

(vii) the provision of cable services or video services to customers at no charge, as required or allowed by this chapter, including without limitation the provision of cable services or video services to public institutions, as required or permitted in this chapter, including without limitation public schools or governmental entities, as required or permitted in this chapter;

(viii) any tax of general applicability imposed upon the holder of a state-issued certificate of franchise authority or upon subscribers by a city, state, federal, or any other governmental entity and required to be collected by the holder of a state-issued certificate of franchise authority and remitted to the taxing entity (including, but not limited to, sales and use tax, gross receipts tax, excise tax, utility users tax, public service tax, communication taxes, and fees not imposed by this chapter);

(ix) any forgone revenue from the holder of a state-issued certificate of franchise authority's provision of free or reduced cost cable services or video services to any person including without limitation employees of the holder of a

state-issued certificate of franchise authority, to the municipality and other public institutions or other institutions as allowed in this chapter; provided, however, that any forgone revenue which the holder of a state-issued certificate of franchise authority chooses not to receive in exchange for trades, barters, services, or other items of value shall be included in gross revenue;

(x) sales of capital assets or sales of surplus equipment that is not used by the purchaser to receive cable services or video services from the holder of a state-issued certificate of franchise authority;

(xi) directory or Internet advertising revenue including, but not limited to, yellow pages, white pages, banner advertisement, and electronic publishing; and

(xii) reimbursement by programmers of marketing costs incurred by the holder of a state-issued franchise for the introduction of new programming that exceed the actual costs.

(C) For purposes of this definition, a provider's network consists solely of the optical spectrum wavelengths, bandwidth, or other current or future technological capacity used for the transmission of video programming over wireline directly to subscribers within the geographic area within the municipality as designated by the provider in its franchise.

(7) "Incumbent cable service provider" means the cable service provider serving the largest number of cable subscribers in a particular municipal franchise area on September 1, 2005.

(8) "Public right-of-way" means the area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which a municipality has an interest.

(9) "Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station, as set forth in 47 U.S.C. Section 522(20).

(10) "Video service" means video programming services provided through wireline facilities located at least in part in the public right-of-way without regard to delivery technology, including Internet protocol technology. This definition does not include any video service provided by a commercial mobile service provider as defined in 47 U.S.C. Section 332(d).

(11) "Video service provider" means a video programming distributor that distributes video programming services through wireline facilities located at least in part in the public right-of-way without regard to delivery technology. This term does not include a cable service provider.

Sec. 66.003. STATE AUTHORIZATION TO PROVIDE CABLE SERVICE OR VIDEO SERVICE. (a) An entity or person seeking to provide cable service or video service in this state after September 1, 2005, shall file an application for a state-issued certificate of franchise authority with the commission as required by this section. An entity providing cable service or video service under a franchise agreement with a municipality is not subject to this subsection with respect to such municipality until the franchise

agreement expires, except as provided by Section 66.004.

(a-1) The commission shall notify an applicant for a state-issued certificate of franchise authority whether the applicant's affidavit described by Subsection (b) is complete before the 15th business day after the applicant submits the affidavit.

(b) The commission shall issue a certificate of franchise authority to offer cable service or video service before the 17th business day after receipt of a completed affidavit submitted by the applicant and signed by an officer or general partner of the applicant affirming:

(1) that the applicant has filed or will timely file with the Federal Communications Commission all forms required by that agency in advance of offering cable service or video service in this state;

(2) that the applicant agrees to comply with all applicable federal and state statutes and regulations;

(3) that the applicant agrees to comply with all applicable municipal regulations regarding the use and occupation of public rights-of-way in the delivery of the cable service or video service, including the police powers of the municipalities in which the service is delivered;

(4) a description of the service area footprint to be served within the municipality, if applicable, otherwise the municipality to be served by the applicant, which may include certain designations of unincorporated areas, which description shall be updated by the applicant prior to the expansion of cable

service or video service to a previously undesignated service area and, upon such expansion, notice to the commission of the service area to be served by the applicant; and

(5) the location of the applicant's principal place of business and the names of the applicant's principal executive officers.

(c) The certificate of franchise authority issued by the commission shall contain:

(1) a grant of authority to provide cable service or video service as requested in the application;

(2) a grant of authority to use and occupy the public rights-of-way in the delivery of that service, subject to the laws of this state, including the police powers of the municipalities in which the service is delivered; and

(3) a statement that the grant of authority is subject to lawful operation of the cable service or video service by the applicant or its successor in interest.

(d) The certificate of franchise authority issued by the commission is fully transferable to any successor in interest to the applicant to which it is initially granted. A notice of transfer shall be filed with the commission and the relevant municipality within 14 business days of the completion of such transfer.

(e) The certificate of franchise authority issued by the commission may be terminated by the cable service provider or video service provider by submitting notice to the commission.

Sec. 66.004. ELIGIBILITY FOR COMMISSION-ISSUED FRANCHISE.

(a) A cable service provider or a video service provider that currently has or had previously received a franchise to provide cable service or video service with respect to such municipalities is not eligible to seek a state-issued certificate of franchise authority under this chapter as to those municipalities until the expiration date of the existing franchise agreement, except as provided by Subsections (b) and (c).

(b) Beginning September 1, 2005, a cable service provider or video service provider that is not the incumbent cable service provider and serves fewer than 40 percent of the total cable customers in a particular municipal franchise area may elect to terminate that municipal franchise and seek a state-issued certificate of franchise authority by providing written notice to the commission and the affected municipality before January 1, 2006. The municipal franchise is terminated on the date the commission issues the state-issued certificate of franchise authority.

(c) A cable service provider that serves fewer than 40 percent of the total cable customers in a municipal franchise area and that elects under Subsection (b) to terminate an existing municipal franchise is responsible for remitting to the affected municipality before the 91st day after the date the municipal franchise is terminated any accrued but unpaid franchise fees due under the terminated franchise. If the cable service provider has credit remaining from prepaid franchise fees, the provider may deduct the amount of the remaining credit from any future fees or taxes it must pay to the municipality, either directly or through

the comptroller.

(d) For purposes of this section, a cable service provider or video service provider will be deemed to have or have had a franchise to provide cable service or video service in a specific municipality if any affiliates or successor entity of the cable or video provider has or had a franchise agreement granted by that specific municipality.

(e) The terms "affiliates or successor entity" in this section shall include but not be limited to any entity receiving, obtaining, or operating under a municipal cable or video franchise through merger, sale, assignment, restructuring, or any other type of transaction.

(f) Except as provided in this chapter, nothing in this chapter is intended to abrogate, nullify, or adversely affect in any way the contractual rights, duties, and obligations existing and incurred by a cable service provider or a video service provider before the enactment of this chapter, and owed or owing to any private person, firm, partnership, corporation, or other entity including without limitation those obligations measured by and related to the gross revenue hereafter received by the holder of a state-issued certificate of franchise authority for services provided in the geographic area to which such prior franchise or permit applies. All liens, security interests, royalties, and other contracts, rights, and interests in effect on September 1, 2005, shall continue in full force and effect, without the necessity for renewal, extension, or continuance, and shall be paid and performed by the holder of a state-issued certificate of

franchise authority, and shall apply as though the revenue generated by the holder of a state-issued certificate of franchise authority continued to be generated pursuant to the permit or franchise issued by the prior local franchising authority or municipality within the geographic area to which the prior permit or franchise applies. It shall be a condition to the issuance and continuance of a state-issued certificate of franchise authority that the private contractual rights and obligations herein described continue to be honored, paid, or performed to the same extent as though the cable service provider continued to operate under its prior franchise or permit, for the duration of such state-issued certificate of franchise authority and any renewals or extensions thereof, and that the applicant so agrees. Any person, firm, partnership, corporation, or other entity holding or claiming rights herein reserved may enforce same by an action brought in a court of competent jurisdiction.

Sec. 66.005. FRANCHISE FEE. (a) The holder of a state-issued certificate of franchise authority shall pay each municipality in which it provides cable service or video service a franchise fee of five percent based upon the definition of gross revenues as set forth in this chapter. That same franchise fee structure shall apply to any unincorporated areas that are annexed by a municipality after the effective date of the state-issued certificate of franchise authority.

(b) The franchise fee payable under this section is to be paid quarterly, within 45 days after the end of the quarter for the preceding calendar quarter. Each payment shall be accompanied by a

summary explaining the basis for the calculation of the fee. A municipality may review the business records of the cable service provider or video service provider to the extent necessary to ensure compensation in accordance with Subsection (a). Each party shall bear the party's own costs of the examination. A municipality may, in the event of a dispute concerning compensation under this section, bring an action in a court of competent jurisdiction.

(c) The holder of a state-issued certificate of franchise authority may recover from the provider's customers any fee imposed by this chapter.

Sec. 66.006. IN-KIND CONTRIBUTIONS TO MUNICIPALITY. (a) Until the expiration of the incumbent cable service provider's agreement, the holder of a state-issued certificate of franchise authority shall pay a municipality in which it is offering cable service or video service the same cash payments on a per subscriber basis as required by the incumbent cable service provider's franchise agreement. All cable service providers and all video service providers shall report quarterly to the municipality the total number of subscribers served within the municipality. The amount paid by the holder of a state-issued certificate of franchise authority shall be calculated quarterly by the municipality by multiplying the amount of cash payment under the incumbent cable service provider's franchise agreement by a number derived by dividing the number of subscribers served by a video service provider or cable service provider by the total number of video or cable service subscribers in the municipality. Such pro rata payments are to be paid quarterly to the municipality within 45

days after the end of the quarter for the preceding calendar quarter.

(b) On the expiration of the incumbent cable service provider's agreement, the holder of a state-issued certificate of franchise authority shall pay a municipality in which it is offering cable service or video service one percent of the provider's gross revenues, as defined by this chapter, or at the municipality's election, the per subscriber fee that was paid to the municipality under the expired incumbent cable service provider's agreement, in lieu of in-kind compensation and grants. Payments under this subsection shall be paid in the same manner as outlined in Section 66.005(b).

(c) All fees paid to municipalities under this section are paid in accordance with 47 U.S.C. Sections 531 and 541(a)(4)(B) and may be used by the municipality as allowed by federal law; further, these payments are not chargeable as a credit against the franchise fee payments authorized under this chapter.

(d) The following services shall continue to be provided by the cable provider that was furnishing services pursuant to its municipal cable franchise until January 1, 2008, or until the term of the franchise was to expire, whichever is later, and thereafter as provided in Subdivisions (1) and (2) below:

(1) institutional network capacity, however defined or referred to in the municipal cable franchise but generally referring to a private line data network capacity for use by the municipality for noncommercial purposes, shall continue to be provided at the same capacity as was provided to the municipality

prior to the date of the termination, provided that the municipality will compensate the provider for the actual incremental cost of the capacity; and

(2) cable services to community public buildings, such as municipal buildings and public schools, shall continue to be provided to the same extent provided immediately prior to the date of the termination. Beginning on January 1, 2008, or the expiration of the franchise agreement, whichever is later, a provider that provides the services may deduct from the franchise fee to be paid to the municipality an amount equal to the actual incremental cost of the services if the municipality requires the services after that date. Such cable service generally refers to the existing cable drop connections to such facilities and the tier of cable service provided pursuant to the franchise at the time of the termination.

Sec. 66.007. BUILD-OUT. The holder of a state-issued certificate of franchise authority shall not be required to comply with mandatory build-out provisions.

Sec. 66.008. CUSTOMER SERVICE STANDARDS. The holder of a state-issued certificate of franchise authority shall comply with customer service requirements consistent with 47 C.F.R. Section 76.309(c) until there are two or more providers offering service, excluding direct-to-home satellite service, in the relevant municipality.

Sec. 66.009. PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS CHANNELS. (a) Not later than 120 days after a request by a municipality, the holder of a state-issued certificate of franchise

authority shall provide the municipality with capacity in its communications network to allow public, educational, and governmental (PEG) access channels for noncommercial programming.

(b) The holder of a state-issued certificate of franchise authority shall provide no fewer than the number of PEG access channels a municipality has activated under the incumbent cable service provider's franchise agreement as of September 1, 2005.

(c) If a municipality did not have PEG access channels as of September 1, 2005, the cable service provider or video service provider shall furnish:

(1) up to three PEG channels for a municipality with a population of at least 50,000; and

(2) up to two PEG channels for a municipality with a population of less than 50,000.

(d) Any PEG channel provided pursuant to this section that is not utilized by the municipality for at least eight hours a day shall no longer be made available to the municipality, but may be programmed at the cable service provider's or video service provider's discretion. At such time as the municipality can certify to the cable service provider or video service provider a schedule for at least eight hours of daily programming, the cable service provider or video service provider shall restore the previously lost channel but shall be under no obligation to carry that channel on a basic or analog tier.

(e) In the event a municipality has not utilized the minimum number of access channels as permitted by Subsection (c), access to the additional channel capacity allowed in Subsection (c) shall be

provided upon 90 days' written notice if the municipality meets the following standard: if a municipality has one active PEG channel and wishes to activate an additional PEG channel, the initial channel shall be considered to be substantially utilized when 12 hours are programmed on that channel each calendar day. In addition, at least 40 percent of the 12 hours of programming for each business day on average over each calendar quarter must be nonrepeat programming. Nonrepeat programming shall include the first three video-castings of a program. If a municipality is entitled to three PEG channels under Subsection (c) and has in service two active PEG channels, each of the two active channels shall be considered to be substantially utilized when 12 hours are programmed on each channel each calendar day and at least 50 percent of the 12 hours of programming for each business day on average over each calendar quarter is nonrepeat programming for three consecutive calendar quarters.

(f) The operation of any PEG access channel provided pursuant to this section shall be the responsibility of the municipality receiving the benefit of such channel, and the holder of a state-issued certificate of franchise authority bears only the responsibility for the transmission of such channel. The holder of a state-issued certificate of franchise authority shall be responsible for providing the connectivity to each PEG access channel distribution point up to the first 200 feet.

(g) The municipality must ensure that all transmissions, content, or programming to be transmitted over a channel or facility by a holder of a state-issued certificate of franchise

authority are provided or submitted to the cable service provider or video service provider in a manner or form that is capable of being accepted and transmitted by a provider, without requirement for additional alteration or change in the content by the provider, over the particular network of the cable service provider or video service provider, which is compatible with the technology or protocol utilized by the cable service provider or video service provider to deliver services.

(h) Where technically feasible, the holder of a state-issued certificate of franchise authority and an incumbent cable service provider shall use reasonable efforts to interconnect their cable or video systems for the purpose of providing PEG programming. Interconnection may be accomplished by direct cable, microwave link, satellite, or other reasonable method of connection. Holders of a state-issued certificate of franchise authority and incumbent cable service providers shall negotiate in good faith and incumbent cable service providers may not withhold interconnection of PEG channels.

(i) A court of competent jurisdiction shall have exclusive jurisdiction to enforce any requirement under this section.

Sec. 66.010. NONDISCRIMINATION BY MUNICIPALITY. (a) A municipality shall allow the holder of a state-issued certificate of franchise authority to install, construct, and maintain a communications network within a public right-of-way and shall provide the holder of a state-issued certificate of franchise authority with open, comparable, nondiscriminatory, and competitively neutral access to the public right-of-way. All use

of a public right-of-way by the holder of a state-issued certificate of franchise authority is nonexclusive and subject to Section 66.011.

(b) A municipality may not discriminate against the holder of a state-issued certificate of franchise authority regarding:

(1) the authorization or placement of a communications network in a public right-of-way;

(2) access to a building; or

(3) a municipal utility pole attachment term.

Sec. 66.011. MUNICIPAL POLICE POWER; OTHER AUTHORITY. (a) A municipality may enforce police power-based regulations in the management of a public right-of-way that apply to the holder of a state-issued certificate of franchise authority within the municipality. A municipality may enforce police power-based regulations in the management of the activities of the holder of a state-issued certificate of franchise authority to the extent that they are reasonably necessary to protect the health, safety, and welfare of the public. Police power-based regulation of the holder of a state-issued certificate of franchise authority's use of the public right-of-way must be competitively neutral and may not be unreasonable or discriminatory. A municipality may not impose on activities of the holder of a state-issued certificate of franchise authority a requirement:

(1) that particular business offices be located in the municipality;

(2) regarding the filing of reports and documents with the municipality that are not required by state or federal law and

that are not related to the use of the public right-of-way except that a municipality may request maps and records maintained in the ordinary course of business for purposes of locating the portions of a communications network that occupy public rights-of-way. Any maps or records of the location of a communications network received by a municipality shall be confidential and exempt from disclosure under Chapter 552, Government Code, and may be used by a municipality only for the purpose of planning and managing construction activity in the public right-of-way. A municipality may not request information concerning the capacity or technical configuration of the holder of a state-issued certificate of franchise authority's facilities;

(3) for the inspection of the holder of a state-issued certificate of franchise authority's business records except to extent permitted under Section 66.005(b);

(4) for the approval of transfers of ownership or control of the holder of a state-issued certificate of franchise authority's business, except that a municipality may require that the holder of a state-issued certificate of franchise authority maintain a current point of contact and provide notice of a transfer within a reasonable time; or

(5) that the holder of a state-issued certificate of franchise authority that is self-insured under the provisions of state law obtain insurance or bonding for any activities within the municipality, except that a self-insured provider shall provide substantially the same defense and claims processing as an insured provider. A bond may not be required from a provider for any work

consisting of aerial construction except that a reasonable bond may be required of a provider that cannot demonstrate a record of at least four years' performance of work in any municipal public right-of-way free of currently unsatisfied claims by a municipality for damage to the right-of-way.

(b) Notwithstanding any other law, a municipality may require the issuance of a construction permit, without cost, to the holder of a state-issued certificate of franchise authority that is locating facilities in or on a public right-of-way in the municipality. The terms of the permit shall be consistent with construction permits issued to other persons excavating in a public right-of-way.

(c) In the exercise of its lawful regulatory authority, a municipality shall promptly process all valid and administratively complete applications of the holder of a state-issued certificate of franchise authority for a permit, license, or consent to excavate, set poles, locate lines, construct facilities, make repairs, affect traffic flow, or obtain zoning or subdivision regulation approvals or other similar approvals. A municipality shall make every reasonable effort not to delay or unduly burden the provider in the timely conduct of the provider's business.

(d) If there is an emergency necessitating response work or repair, the holder of a state-issued certificate of franchise authority may begin the repair or emergency response work or take any action required under the circumstances without prior approval from the affected municipality, if the holder of a state-issued certificate of franchise authority notifies the municipality as

promptly as possible after beginning the work and later obtains any approval required by a municipal ordinance applicable to emergency response work.

(e) The commission shall have no jurisdiction to review such police power-based regulations and ordinances adopted by a municipality to manage the public rights-of-way.

Sec. 66.012. INDEMNITY IN CONNECTION WITH RIGHT-OF-WAY; NOTICE OF LIABILITY. (a) The holder of a state-issued certificate of franchise authority shall indemnify and hold a municipality and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability, and suits of any kind and nature, including personal or bodily injury (including death), property damage, or other harm for which recovery of damages is sought, that is found by a court of competent jurisdiction to be caused solely by the negligent act, error, or omission of the holder of a state-issued certificate of franchise authority or any agent, officer, director, representative, employee, affiliate, or subcontractor of the holder of a state-issued certificate of franchise authority or their respective officers, agents, employees, directors, or representatives, while installing, repairing, or maintaining facilities in a public right-of-way. The indemnity provided by this subsection does not apply to any liability resulting from the negligence of the municipality or its officers, employees, contractors, or subcontractors. If the holder of a state-issued

certificate of franchise authority and the municipality are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the municipality under state law and without waiving any defenses of the parties under state law. This subsection is solely for the benefit of the municipality and the holder of a state-issued certificate of franchise authority and does not create or grant any rights, contractual or otherwise, for or to any other person or entity.

(b) The holder of a state-issued certificate of franchise authority and a municipality shall promptly advise the other in writing of any known claim or demand against the holder of a state-issued certificate of franchise authority or the municipality related to or arising out of the holder of a state-issued certificate of franchise authority's activities in a public right-of-way.

(c) The commission shall have no jurisdiction to review such police power-based regulations and ordinances adopted by a municipality to manage the public rights-of-way.

Sec. 66.013. MUNICIPAL AUTHORITY. In addition to a municipality's authority to exercise its nondiscriminatory police power with respect to public rights-of-way under current law, a municipality's authority to regulate the holder of state-issued certificate of franchise authority is limited to:

(1) a requirement that the holder of a state-issued certificate of franchise authority who is providing cable service

or video service within the municipality register with the municipality and maintain a point of contact;

(2) the establishment of reasonable guidelines regarding the use of public, educational, and governmental access channels; and

(3) submitting reports within 30 days on the customer service standards referenced in Section 66.008 if the provider is subject to those standards and has continued and unresolved customer service complaints indicating a clear failure on the part of the holder of a state-issued certificate of franchise authority to comply with the standards.

Sec. 66.014. DISCRIMINATION PROHIBITED. (a) The purpose of this section is to prevent discrimination among potential residential subscribers.

(b) A cable service provider or video service provider that has been granted a state-issued certificate of franchise authority may not deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which such group resides.

(c) An affected person may seek enforcement of the requirements described by Subsection (b) by initiating a proceeding with the commission. A municipality within which the potential residential cable service or video service subscribers referenced in Subsection (b) may be considered an affected person for purposes of this section.

(d) The holder of a state-issued certificate of franchise authority shall have a reasonable period of time to become capable

of providing cable service or video service to all households within the designated franchise area as defined in Section 66.003(b)(4) and may satisfy the requirements of this section through the use of an alternative technology that provides comparable content, service, and functionality.

(e) Notwithstanding any provision of this chapter, the commission has the authority to make the determination regarding the comparability of the technology and the service provided. Notwithstanding any provision of this chapter, the commission has the authority to monitor the deployment of cable services, video services, or alternate technology.

Sec. 66.015. COMPLIANCE. (a) Should the holder of a state-issued certificate of franchise authority be found by a court of competent jurisdiction to be in noncompliance with the requirements of this chapter, the court shall order the holder a state-issued certificate of franchise authority, within a specified reasonable period of time, to cure such noncompliance. Failure to comply shall subject the holder of the state-issued franchise of franchise authority to penalties as the court shall reasonably impose, up to and including revocation of the state-issued certificate of franchise authority granted under this chapter.

(b) A municipality within which the provider offers cable service or video service shall be an appropriate party in any such litigation.

Sec. 66.016. APPLICABILITY OF OTHER LAWS. (a) Nothing in this chapter shall be interpreted to prevent a voice provider,

cable service provider or video service provider, or municipality from seeking clarification of its rights and obligations under federal law or to exercise any right or authority under federal or state law.

(b) Nothing in this chapter shall limit the ability of a municipality under existing law to receive compensation for use of the public rights-of-way from entities determined not to be subject to all or part of this chapter, including but not limited to provider of Internet protocol cable or video services, unless such payments are expressly prohibited by federal law.

Sec. 66.017. STUDY. (a) The telecommunications competitiveness legislative oversight committee shall conduct a joint interim study with the commission regarding the following:

(1) appropriate alternative forms of competitively neutral compensation methodology that should flow to municipalities from all sources related to the provision of information services, telecommunication services, cable services, and video services;

(2) right-of-way access and fees;

(3) the transition from local franchise authority to state-issued authority, including methods to maintain current municipal revenue streams, including franchise fees and in-kind contributions; continuation of public, educational, and governmental access channels; and build-out requirements; and

(4) other relevant issues.

(b) The committee shall report its findings to the lieutenant governor and speaker of the House of Representatives no

later than December 31, 2006.

(c) This section expires January 1, 2007.

SECTION 28. Section 283.002, Local Government Code, is amended by amending Subdivision (2) and adding Subdivision (7) to read as follows:

(2) "Certificated telecommunications provider" means a person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the commission to offer local exchange telephone service or a person who provides voice service.

(7) "Voice service" means voice communications services provided through wireline facilities located at least in part in the public right-of-way, without regard to the delivery technology, including Internet protocol technology. The term does not include voice service provided by a commercial mobile service provider as defined by 47 U.S.C. Section 332(d).

SECTION 29. The following provisions of the Utilities Code are repealed:

(1) Subchapters B through F, Chapter 62; and

(2) Chapters 61 and 63.

SECTION 30. The Public Utility Commission of Texas shall conduct a study to determine whether Title 2, Utilities Code, adequately preserves customer choice in the Internet-enabled applications employed in association with broadband service and shall report its conclusions and recommendations to the legislature not later than January 1, 2007. The study must include consultation with and comment from all interested parties.

SECTION 31. If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

SECTION 32. This Act takes effect September 1, 2005, if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for effect on that date, this Act takes effect on the 91st day after the last day of the legislative session.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 5 passed the Senate on August 9, 2005, by the following vote: Yeas 24, Nays 3, one present not voting.

Secretary of the Senate

I hereby certify that S.B. No. 5 passed the House on August 10, 2005, by the following vote: Yeas 144, Nays 1, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor

Second Regular Session 114th General Assembly (2006)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2005 Regular Session of the General Assembly.

HOUSE ENROLLED ACT No. 1279

AN ACT to amend the Indiana Code concerning utilities and transportation.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 4-23-7.1-40.5, AS ADDED BY P.L.136-2005, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 40.5. (a) For purposes of this section, "accessible electronic information service" means a service that provides to an eligible individual news and other timely information, including newspapers, from a multistate service center, using high speed computers and telecommunications technology for Internet acquisition of content and rapid distribution in a form appropriate for use by an eligible individual.

(b) For purposes of this section, "director" refers to the director of the Indiana talking books and braille division of the Indiana state library.

(c) For purposes of this section, "eligible individual" means an individual who is blind or disabled and qualifies for services under 36 CFR 701.10(b).

(d) For purposes of this section, "qualified entity" means an agency, instrumentality, or political subdivision of the state or a nonprofit organization that:

(1) using computer technology, produces audio or braille editions of daily news reports, including newspapers, for the purpose of providing eligible individuals with access to news;

(2) obtains electronic news text through direct transfer

arrangements made with participating news organizations; and

(3) provides a means of program administration and reader registration on the Internet.

(e) The director may enter into an agreement with a qualified entity to provide an accessible electronic information service for eligible individuals. This service shall be planned for continuation from year to year and make maximum use of federal and other funds available by:

(1) obtaining grants or in kind support from appropriate programs; and

(2) securing access to low cost interstate rates for telecommunications by reimbursement or otherwise.

(f) The accessible electronic information service fund is established for purposes of this section. The fund consists of appropriations from the general assembly, loan proceeds, and gifts and grants to the fund.

(g) The treasurer of state shall invest the money in the accessible electronic information service fund not currently needed to meet the obligations of the fund in the same manner as other public funds may be invested.

(h) The money in the accessible electronic information service fund at the end of a state fiscal year does not revert to the state general fund but remains in the fund to be used exclusively for purposes of this section.

SECTION 2. IC 8-1-1.1-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. The governor shall appoint a consumer counselor, for a term of four (4) years at a salary to be fixed by the governor. The counselor shall serve at the will and pleasure of the governor. The counselor shall be a practicing attorney, and qualified by knowledge and experience to practice in utility regulatory agency proceedings. The counselor shall apply ~~his~~ **the counselor's** full efforts to the duties of the office and may not ~~be actively engaged~~ **engage** in any ~~other~~ occupation, practice, profession or business **that would conflict with the duties of the office.**

SECTION 3. IC 8-1-2-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. (a) **Except as provided in section 1.1 of this chapter,** "public utility", as used in this chapter, means every corporation, company, partnership, limited liability company, individual, association of individuals, their lessees, trustees, or receivers appointed by a court, that may own, operate, manage, or control any plant or equipment within the state for the:

(1) conveyance of telegraph or telephone messages;

(2) production, transmission, delivery, or furnishing of heat, light,

water, or power; or

(3) collection, treatment, purification, and disposal in a sanitary manner of liquid and solid waste, sewage, night soil, and industrial waste.

The term does not include a municipality that may acquire, own, or operate any of the foregoing facilities.

(b) "Municipal council", as used in this chapter, means the legislative body of any town or city in Indiana wherein the property of the public utility or any part thereof is located.

(c) "Municipality", as used in this chapter, means any city or town of Indiana.

(d) "Rate", as used in this chapter, means every individual or joint rate, fare, toll, charge, rental, or other compensation of any utility or any two (2) or more such individual or joint rates, fares, tolls, charges, rentals, or other compensation of any utility or any schedule or tariff thereof, but nothing in this subsection shall give the commission any control, jurisdiction, or authority over the rate charged by a municipally owned utility except as in this chapter expressly provided.

(e) "Service" is used in this chapter in its broadest and most inclusive sense and includes not only the use or accommodation afforded consumers or patrons but also any product or commodity furnished by any public or other utility and the plant, equipment, apparatus, appliances, property, and facility employed by any public or other utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which such public or other utility is engaged and to the use and accommodation of the public.

(f) "Commission", as used in this chapter, means the commission created by IC 8-1-1-2.

(g) "Utility", as used in this chapter, means every plant or equipment within the state used for:

(1) the conveyance of telegraph and telephone messages;

(2) the production, transmission, delivery, or furnishing of heat, light, water, or power, either directly or indirectly to the public; or

(3) collection, treatment, purification, and disposal in a sanitary manner of liquid and solid waste, sewage, night soil, and industrial waste.

The term does not include a municipality that may acquire, own, or operate facilities for the collection, treatment, purification, and disposal in a sanitary manner of liquid and solid waste, sewage, night soil, and industrial waste. A warehouse owned or operated by any person, firm, limited liability company, or corporation engaged in the business of

operating a warehouse business for the storage of used household goods is not a public utility within the meaning of this chapter.

(h) "Municipally owned utility", as used in this chapter, includes every utility owned or operated by a municipality.

(i) "Indeterminate permit", as used in this chapter, means every grant, directly or indirectly from the state, to any corporation, company, partnership, limited liability company, individual, association of individuals, their lessees, trustees, or receivers appointed by a court, of power, right, or privilege to own, operate, manage, or control any plant or equipment, or any part of a plant or equipment, within this state, for the:

(1) production, transmission, delivery, or furnishing of heat, light, water, or power, either directly or indirectly to or for the public;

(2) collection, treatment, purification, and disposal in a sanitary manner of liquid and solid waste, sewage, night soil, and industrial waste; or

(3) furnishing of facilities for the transmission of intelligence by electricity between points within this state;

which shall continue in force until such time as the municipality shall exercise its right to purchase, condemn, or otherwise acquire the property of such public utility, as provided in this chapter, or until it shall be otherwise terminated according to law.

SECTION 4. IC 8-1-2-1.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.1. A person or an entity that:**

(1) transmits communications through Internet Protocol enabled retail services, including:

(A) voice;

(B) data;

(C) video; or

(D) any combination of voice, data, and video communications; or

(2) provides the necessary software, hardware, transmission service, or transmission path for communications described in subdivision (1);

is not a public utility solely by reason of engaging in any activity described in subdivisions (1) through (2).

SECTION 5. IC 8-1-2-88.7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 88.7. (a) As used in this section, "financial assistance" means:

(1) a loan or loan guarantee; or

(2) a lien accommodation provided to secure a loan made by

another lender;

that is made by the Rural Electrification Administration of the United States Department of Agriculture (REA) or by the Rural Telephone Bank.

(b) As used in this section, "REA borrower" means a telephone company ~~regulated under~~ **subject to** this chapter that is the recipient of financial assistance.

(c) ~~In determining rates for a telephone company that is regulated under this chapter and that is~~ An REA borrower ~~once the commission determines that property of the REA borrower is used and useful for the provision of telephone service and has been placed in service, the commission shall approve rates to be charged by~~ **shall charge rates sufficient to enable** the REA borrower ~~that will enable it~~ to:

(1) satisfy its reasonable expenses and obligations; and

(2) earn a rate of return on the property sufficient to cover the REA borrower's cost of capital, including any financial assistance and the interest thereon.

(d) So long as there remains any unpaid portion of any financial assistance associated with the property of an REA borrower, ~~determined under subsection (c) to be used and useful and placed in service,~~ the rates of the REA borrower shall be set at a level sufficient to repay the financial assistance regardless of any change in the ~~regulatory~~ status of the property, including ~~without limitation,~~ the full or partial retirement of the property or any other change in the status of the property. ~~as reasonably necessary or used and useful.~~

SECTION 6. IC 8-1-2.6-0.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 0.1. (a) As used in this chapter, "basic telecommunications service" means stand alone telephone exchange service (as defined in 47 U.S.C. 153(47)) that:**

(1) is provided to a residential customer through the customer's primary line; and

(2) is:

(A) the sole service purchased by the customer;

(B) not part of a package of services, a promotion, or a contract; or

(C) not otherwise offered at a discounted price.

(b) The term includes, at a minimum, the following:

(1) Voice grade access to the public switched telephone network with minimum bandwidth of three hundred (300) to three thousand (3,000) hertz.

(2) Dual tone multifrequency signaling and single party

service.

(3) Access to:

(A) emergency services, including access to 911 and enhanced 911 if provided by the local government having jurisdiction in the service area;

(B) operator services;

(C) local directory assistance;

(D) telephone relay services; and

(E) interexchange service.

(4) Toll limitation services for qualifying low income customers.

(c) The term does not include a functionally equivalent service provided by a person or an entity described in IC 8-1-2-1.1.

SECTION 7. IC 8-1-2.6-0.2 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 0.2. As used in this chapter, "incumbent local exchange carrier" has the meaning set forth in 47 U.S.C. 251(h).**

SECTION 8. IC 8-1-2.6-0.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 0.3. (a) As used in this chapter, "nonbasic telecommunications service" means retail telecommunications service other than:**

(1) basic telecommunications service, except when the service is purchased by the customer:

(A) in conjunction with another service;

(B) as part of a package of services, a promotion, or a contract; or

(C) at an otherwise discounted price;

(2) commercial mobile radio service (as defined in 47 CFR 51.5);

(3) services outside the jurisdiction of the commission under section 1.1 of this chapter; and

(4) switched and special access services.

(b) The term includes services included in:

(1) customer specific contracts;

(2) volume, term, and discount pricing options; and

(3) packages, bundles, and promotions, including offers designed to obtain new customers, retain existing customers, or bring back former customers.

SECTION 9. IC 8-1-2.6-0.4 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE

UPON PASSAGE]: **Sec. 0.4. As used in this chapter, "provider" means a person or an entity that offers basic or nonbasic telecommunications service.**

SECTION 10. IC 8-1-2.6-0.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 0.5. As used in this chapter, "rates and charges", with respect to basic telecommunications service, means the monthly charge to a customer for basic telecommunications service, including:**

(1) recurring charges for flat rate and message rate service; and

(2) any nonrecurring charge for installation or a line or service connection.

SECTION 11. IC 8-1-2.6-0.6 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 0.6. As used in this chapter, "telecommunications" has the meaning set forth in 47 U.S.C. 153(43).**

SECTION 12. IC 8-1-2.6-0.7 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 0.7. As used in this chapter, "telecommunications service" has the meaning set forth in 47 U.S.C. 153(46).**

SECTION 13. IC 8-1-2.6-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. The Indiana general assembly hereby declares that:

(1) the maintenance of universal telephone service is a continuing goal of the commission in the exercise of its jurisdiction;

(2) competition has become commonplace in the provision of ~~certain telephone~~ **telecommunications** services in Indiana and the United States;

(3) advancements in and the convergence of technologies that provide voice, video, and data transmission, including:

(A) landline, wireless, cable, satellite, and Internet transmissions; and

(B) transmissions involving voice over Internet Protocol (VOIP), Internet Protocol enabled services, and voice over power lines;

are substantially increasing consumer choice, reinventing the marketplace with unprecedented speed, and making available highly competitive products and services and new methods of delivering local exchange service;

~~(3)~~ **(4)** traditional ~~commission~~ regulatory policies, ~~and~~ practices, and ~~existing~~ statutes are not designed to deal with a competitive environment **and technological advancements;**

~~(4)~~ **(5)** an environment in which Indiana consumers will have available the widest array of state-of-the-art ~~telephone~~ **communications** services at the most economic and reasonable cost possible will necessitate full and fair **facilities based** competition in the delivery of ~~certain~~ ~~telephone~~ **telecommunications** services throughout ~~the state,~~ **Indiana;** and

~~(5)~~ **(6) streamlining of, and** flexibility in, the regulation of providers of ~~telephone~~ **telecommunications** services, **regardless of the technology used,** is essential to the well-being of ~~the state,~~ **Indiana,** its economy, and its citizens, and that the public interest requires that the commission be authorized to formulate and adopt rules and policies as will permit the commission, in the exercise of its expertise, to regulate and control the provision of ~~telephone~~ **telecommunications** services to the public in an increasingly competitive **and technologically changing** environment, giving due regard to the interests of consumers and the public, **the ability of market forces to encourage innovation and investment,** and ~~to~~ the continued **universal** availability of ~~universal telephone~~ **basic telecommunications** service.

SECTION 14. IC 8-1-2.6-1.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.1. The commission shall not exercise jurisdiction over:**

(1) advanced services (as defined in 47 CFR 51.5);

(2) broadband service, however defined or classified by the Federal Communications Commission;

(3) information services (as defined in 47 U.S.C. 153(20));

(4) Internet Protocol enabled retail services:

(A) regardless of how the service is classified by the Federal Communications Commission; and

(B) except as expressly permitted under IC 8-1-2.8;

(5) commercial mobile service (as defined in 47 U.S.C. 332); or

(6) any service not commercially available on March 28, 2006.

SECTION 15. IC 8-1-2.6-1.2 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.2. Except as provided in sections 1.5(c), 12, and 13 of this chapter, after March 27, 2006, the commission shall not exercise jurisdiction over any nonbasic**

telecommunications service.

SECTION 16. IC 8-1-2.6-1.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.3. (a) As used in this section, "broadband service" means a connection to the Internet that provides capacity for transmission at an average speed of at least one and one-half (1.5) megabits per second downstream and at least three hundred eighty-four (384) kilobits per second upstream, regardless of the technology or medium used to provide the connection. The term includes a connection to the Internet provided by wireless technology, copper wire, fiber optic cable, coaxial cable, broadband over power lines, or other facilities or future technologies. The term does not include any of the following:**

(1) Value added services in which computer processing applications are used to act on the form, content, code, or protocol of any information transmitted.

(2) Value added services providing text, graphic, video, or audio program content for a purpose other than transmission.

(3) The transmission of video programming or other programming:

(A) provided by; or

(B) generally considered comparable to programming provided by;

a television broadcast station or a radio broadcast station, including cable TV, direct broadcast satellite, and digital television.

(4) A connection to the Internet provided through satellite technology.

(b) As used in this section, "rate transition period" refers to the period beginning March 28, 2006, and ending June 30, 2009, during which a provider may act under this section to increase the provider's flat monthly rate for basic telecommunications service offered in one (1) or more local exchange areas in Indiana.

(c) This subsection applies to a provider that offers basic telecommunications service in one (1) or more local exchange areas in Indiana on March 27, 2006. Subject to subsection (e), during the rate transition period, a provider may act without the prior approval of the commission to increase the provider's flat monthly rate for basic telecommunications service in any local exchange area in which the provider offers basic telecommunications service on March 27, 2006. Subject to subsection (h), a provider may increase the provider's flat monthly rate for basic

telecommunications service in a local exchange area as follows:

(1) The provider may increase the flat monthly rate not more frequently than once during each successive twelve (12) month period during the period beginning March 28, 2006, and ending June 30, 2009. The amount of any increase in the flat monthly rate imposed during a twelve (12) month period described in this subdivision may not exceed one dollar ($1). If a provider:

(A) does not impose an increase during any twelve (12) month period described in this subdivision; or

(B) imposes an increase less than the maximum one dollar ($1) increase allowed under this subdivision during any twelve (12) month period described in this subdivision;

the provider may not impose the unused increase in any subsequent twelve (12) month period described in this subdivision.

(2) The provider may increase the flat monthly rate not more frequently than three (3) times during the entire rate transition period. The amount of the total increase in the flat monthly rate during the transition period may not exceed three dollars ($3), as calculated based on the flat monthly rate in effect in the local exchange area on March 27, 2006.

The provider shall provide the commission and all affected customers thirty (30) days advance notice of each rate increase under this subsection.

(d) This subsection applies to a provider that, at any time during the rate transition period, begins offering basic telecommunications service in a local exchange area in Indiana in which the provider did not offer basic telecommunications service on March 27, 2006. In accordance with the procedures set forth in IC 8-1-2, the commission shall approve the initial rates and charges for basic telecommunications service first offered by the provider in a local exchange area at any time during the rate transition period. Subject to subsections (e) and (h), beginning twelve (12) months after the commission approves the initial rates and charges for the local exchange area, the provider may increase the initial flat monthly rate for basic telecommunications service in accordance with subsection (c). However, subsection (c)(2) does not apply to a rate increase under this subsection. The provider may not increase the flat monthly rate under this subsection during the rate transition period more frequently than the number of twelve (12) month periods remaining in the rate transition period at the

time the provider is first eligible to increase the initial flat monthly rate under this subsection. The amount of the total increase in the flat monthly rate during the rate transition period may not exceed the product of:

(1) one dollar ($1); multiplied by

(2) the number of twelve (12) month periods remaining in the rate transition period at the time the provider is first eligible to increase the initial flat monthly rate under this subsection.

The provider shall provide the commission and all affected customers thirty (30) days advance notice of each rate increase under this subsection.

(e) This subsection applies to a provider that acts under subsection (c) or (d) to increase the provider's flat monthly rate for basic telecommunications service in a local exchange area in Indiana. Not later than eighteen (18) calendar months after the provider's first rate increase in the local exchange area under subsection (c) or (d), the provider must offer broadband service to at least fifty percent (50%) of the households located in the local exchange area, at the average speeds set forth in subsection (a), as determined by the commission after notice and an opportunity for hearing. The commission may extend the eighteen (18) month period allowed under this subsection by not more than nine (9) additional calendar months for good cause shown by the provider. The commission shall hold a hearing and make a finding as to whether the provider offers broadband service to at least fifty percent (50%) of the households in the local exchange area not later than the earlier of the following:

(1) Ninety (90) days after a request by the provider for a hearing and determination by the commission. The provider may request a hearing and determination under this subdivision at any time before the expiration of:

(A) the eighteen (18) month period allowed by this subsection; or

(B) any extension of the eighteen (18) month period allowed by the commission under this subsection.

(2) Ninety (90) days after the expiration of:

(A) the eighteen (18) month period allowed by this subsection; or

(B) any extension of the eighteen (18) month period allowed by the commission under this subsection;

if the provider does not request a hearing and determination under subdivision (1).

(f) If, after a hearing under subsection (e), the commission determines that the provider does not offer broadband service to at least fifty percent (50%) of the households in the local exchange area not later than eighteen (18) months after the provider's first rate increase in the local exchange area under subsection (c) or (d), the commission may require the provider to:

(1) refund to customers; or

(2) pay to the commission as a civil penalty;

an amount equal to the incremental revenue accruing to the provider as a result of all rate increases imposed by the provider in the local exchange area under subsection (c) or (d), plus interest. The commission shall determine the amount of interest added to a refund or payment made under this subsection by applying the average interest rate paid during the eighteen (18) months after the provider's first rate increase to depositors by the fifteen (15) largest banks with their principal offices in Indiana. A determination by the commission under this subsection is subject to appeal under IC 8-1-3.

(g) This subsection applies to an incumbent local exchange carrier that offers basic telecommunications service in one (1) or more local exchange areas in Indiana on March 27, 2006. Throughout the rate transition period, the incumbent local exchange carrier shall continue to make available a flat monthly rate with unlimited local calling for basic telecommunications service in all local exchange areas in which the incumbent local exchange carrier offers basic telecommunications service on March 27, 2006, regardless of whether the incumbent local exchange carrier increases the flat monthly rate in any of those local exchange areas under subsection (c). Throughout the transition period, an extended area of service in which the incumbent local exchange carrier offers basic telecommunications service on March 27, 2006, may not be reduced in area or scope without the approval of the commission after notice and hearing.

(h) If, at any time during the rate transition period, the commission determines in accordance with IC 8-1-2-113 that an emergency exists, the commission may act under IC 8-1-2-113 to temporarily alter, amend, or suspend the limits on the flat monthly rate increases set forth in subsections (c) and (d) if necessary to maintain a provider's financial integrity and ability to provide adequate basic telecommunications service. The commission shall reimplement the limits on flat monthly rate increases, as set forth in subsections (c) and (d), when the commission is satisfied the

emergency no longer exists.

(i) After June 30, 2009, a provider that offers basic telecommunications service in Indiana:

(1) must offer a flat monthly rate with unlimited local calling for basic telecommunications service in each local exchange area in Indiana in which the provider offers basic telecommunications service; and

(2) may not, in any local exchange area in Indiana in which the provider offers basic telecommunications service, offer any service plan for basic telecommunications service that includes measured local service.

SECTION 17. IC 8-1-2.6-1.4 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.4. Except as provided in sections 1.5(c), 12, and 13 of this chapter, after June 30, 2009, the commission shall not exercise jurisdiction over basic telecommunications service.**

SECTION 18. IC 8-1-2.6-1.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.5. (a) In acting to impose any requirements or set any prices concerning:**

(1) interconnection with the facilities and equipment of providers for purposes of 47 U.S.C. 251(c)(2);

(2) the resale of telecommunications service for purposes of 47 U.S.C. 251(c)(4); or

(3) the unbundled access of one (1) provider to the network elements of another provider for purposes of 47 U.S.C. 251(c)(3);

the commission shall not exceed the authority delegated to the commission under federal laws and regulations with respect to those actions. This subsection does not affect the commission's authority under IC 8-1-2-5.

(b) Subject to any regulations adopted by the Federal Communications Commission, this section does not affect:

(1) the commission's authority to mediate a dispute between providers under 47 U.S.C. 252(a);

(2) the commission's authority to arbitrate a dispute between providers under 47 U.S.C. 252(b);

(3) the commission's authority to approve an interconnection agreement under 47 U.S.C. 252(e), including the authority to establish service quality metrics and liquidated damages;

(4) the commission's authority to review and approve a

provider's statement of terms and conditions under 47 U.S.C. 252(f);

(5) a provider's ability to file a complaint with the commission to have a dispute decided by the commission:

(A) after notice and hearing; and

(B) in accordance with this article; or

(6) the commission's authority to resolve an interconnection dispute between providers under the expedited procedures set forth in 170 IAC 7-7.

(c) If a provider's rates and charges for intrastate switched or special access service are:

(1) at issue in a dispute that the commission is authorized to mediate, arbitrate, or otherwise determine under state or federal law; or

(2) included in an interconnection agreement or a statement of terms and conditions that the commission is authorized to review or approve under state or federal law;

the commission shall consider the provider's rates and charges for intrastate switched or special access service to be just and reasonable if the intrastate rates and charges mirror the provider's interstate rates and charges for switched or special access service.

SECTION 19. IC 8-1-2.6-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 2. (a) ~~Notwithstanding any other statute, the commission may:~~

~~(1) on its own motion;~~

~~(2) at the request of the utility consumer counselor;~~

~~(3) at the request of one (1) or more telephone companies; or~~

~~(4) at the request of any class satisfying the standing requirements of IC 8-1-2-54;~~

~~enter an order, after notice and hearing, that the public interest requires the commission to commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over telephone companies or certain telephone services.~~ **This section applies to rules and orders that:**

(1) concern telecommunications service or providers of telecommunications service; and

(2) may be adopted or issued by the commission under the authority of state or federal law.

(b) Rules and orders described in this section:

(1) may be adopted or issued only after notice and hearing, unless:

(A) the commission determines in accordance with IC 8-1-2-113 that an emergency exists that requires the

commission or a provider to take immediate action to:

(i) prevent injury to the business or interests of the citizens of Indiana; or

(ii) maintain a provider's financial integrity and ability to provide adequate basic telecommunications service;

(B) the commission is authorized under IC 8-1-2 to adopt a particular rule or issue a particular order without the necessity of a hearing; or

(C) after receiving notice of the commission's proposed action, all parties to a proceeding consent to the commission taking action without a hearing; and

(2) must be:

(A) consistent with this chapter; and

(B) in the public interest, as determined by the commission under subsection (d).

(c) Rules and orders described in this section must promote one (1) or more of the following:

(1) Cost minimization for providers to the extent that a provider's quality of service and facilities are not diminished.

(2) A more accurate evaluation by the commission of a provider's physical or financial conditions or needs as well as a less costly regulatory procedure for either the provider, the provider's customers, or the commission.

(3) Consumer access to affordable basic telecommunications service.

(4) Development of depreciation guidelines and procedures that recognize technological obsolescence.

(5) Increased provider management efficiency beneficial to customers.

(6) Regulation consistent with a competitive environment.

~~(b)~~ **(d)** In determining whether the public interest will be served, **as required under subsection (b),** the commission shall consider:

(1) whether technological change, competitive forces, or regulation by other state and federal regulatory bodies render the exercise of jurisdiction by the commission unnecessary or wasteful;

(2) whether the exercise of commission jurisdiction produces tangible benefits to ~~telephone company~~ **the** customers **of providers;** and

(3) whether the exercise of commission jurisdiction inhibits a regulated entity from competing with unregulated providers of functionally similar ~~telephone~~ **telecommunications** services or

equipment.

~~(c) The commission may:~~

~~(1) on its own motion;~~

~~(2) at the request of the utility consumer counselor;~~

~~(3) at the request of one (1) or more telephone companies; or~~

~~(4) at the request of any class satisfying the standing requirements of IC 8-1-2-54;~~

~~enter an order notifying any telephone company or class of telephone companies jurisdiction over which was either limited or not exercised according to this section that the commission will proceed to exercise jurisdiction over the telephone company, class of telephone companies, or class of telephone services provided by telephone companies to the extent the commission considers appropriate unless one (1) or more of those telephone companies formally request a hearing within fifteen (15) days following the date of such order.~~

(e) This section does not affect the commission's authority under IC 8-1-2-5.

SECTION 20. IC 8-1-2.6-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. (a) A regulatory flexibility committee is established to monitor competition in the ~~telephone~~ **telecommunications** industry.

(b) The committee is composed of the members of a house standing committee selected by the speaker of the house of representatives and a senate standing committee selected by the president pro tempore of the senate. In selecting standing committees under this subsection, the speaker and president pro tempore shall determine which standing committee of the house of representatives and the senate, respectively, has subject matter jurisdiction that most closely relates to the electricity, gas, energy policy, and telecommunications jurisdiction of the regulatory flexibility committee. The chairpersons of the standing committees selected under this subsection shall co-chair the regulatory flexibility committee.

(c) The commission shall, by July 1 of each year, prepare for presentation to the regulatory flexibility committee ~~an analysis of~~ **a report that includes** the **following:**

(1) An analysis of the effects of competition **and technological change** on universal service and on pricing of all ~~telephone~~ **telecommunications** services ~~under the jurisdiction of the commission.~~ **offered in Indiana.**

(2) An analysis of the status of competition and technological change in the provision of video service (as defined in IC 8-1-34-14) to Indiana customers, as determined by the

commission in carrying out its duties under IC 8-1-34. The commission's analysis under this subdivision must include a description of:

(A) the number of multichannel video programming distributors offering video service to Indiana customers;

(B) the technologies used to provide video service to Indiana customers; and

(C) the effects of competition on the pricing and availability of video service in Indiana.

(3) Beginning with the report due July 1, 2007, and in each report due in an odd-numbered year after July 1, 2007:

(A) an identification of all telecommunications rules and policies that are eliminated by the commission under section 4.1 of this chapter during the two (2) most recent state fiscal years; and

(B) an explanation why the telecommunications rules and policies identified under clause (A) are no longer in the public interest or necessary to protect consumers.

(d) In addition to reviewing the commission report prepared under subsection (c), the regulatory flexibility committee shall also issue a report and recommendations to the legislative council by November 1 of each year that is based on a review of the following issues:

(1) The effects of competition **and technological change** in the ~~telephone~~ **telecommunications** industry and impact of competition on available subsidies used to maintain universal service.

(2) The status of modernization of the ~~public telephone network~~ **publicly available telecommunications infrastructure** in Indiana and the incentives required to further enhance this infrastructure.

(3) The effects on economic development and educational opportunities of ~~this~~ **the** modernization **described in subdivision (2).**

(4) The current ~~method~~ **methods** of regulating ~~telephone companies~~ **providers, at both the federal and state levels,** and the ~~method's~~ effectiveness **of the methods.**

(5) The economic and social effectiveness of current ~~telephone~~ **telecommunications** service pricing.

(6) All other telecommunications issues the committee deems appropriate.

The report and recommendations issued under this subsection to the legislative council must be in an electronic format under IC 5-14-6.

(e) The regulatory flexibility committee shall meet on the call of the co-chairpersons to study telecommunications issues described in subsection (d). The committee shall, with the approval of the commission, retain the independent consultants the committee considers appropriate to assist the committee in the review and study. The expenses for the consultants shall be paid by the commission.

SECTION 21. IC 8-1-2.6-4.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.1. (a) Not later than:**

(1) July 1, 2007; and

(2) July 1 of each odd-numbered year after July 1, 2007;

the commission shall, through a rulemaking proceeding under IC 4-22-2 or another commission proceeding, identify and eliminate rules and policies concerning telecommunications service and telecommunications service providers if the rules or policies are no longer necessary in the public interest or for the protection of consumers as the result of meaningful economic competition between providers of telecommunications services.

(b) Not later than July 1, 2007, the commission shall adopt rules under IC 4-22-2 to require a telecommunications service provider, at any time the provider communicates with a residential customer about changing the customer's basic telecommunications service to nonbasic telecommunications service, to notify the residential customer of:

(1) the option of basic telecommunications service; and

(2) any regulatory protections, including pricing or quality of service protections, that the residential customer would forego by switching to nonbasic telecommunications service.

(c) In carrying out this section, the commission shall promote the policies and purposes set forth in this chapter. Beginning in 2007, and in each odd-numbered year after 2007, the commission's annual report to the regulatory flexibility committee under section 4 of this chapter must:

(1) identify any regulation or policy eliminated by the commission under this section during the two (2) most recent state fiscal years; and

(2) explain why the regulation or policy is no longer in the public interest or necessary to protect consumers.

SECTION 22. IC 8-1-2.6-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 8. (a) As used in this section, "rate reduction" means a decrease in either recurring or nonrecurring rates or charges.

(b) Notwithstanding any other provision of this chapter or any other statute, a ~~telephone company~~ **provider** may ~~subject to the prior approval of the commission,~~ participate in any rate reduction program for residential customers funded from revenues provided by any governmental entity or other revenues administered by an agency of that entity.

SECTION 23. IC 8-1-2.6-12 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 12. This chapter does not terminate or otherwise change the terms and conditions of a settlement agreement approved by the commission under this chapter before July 29, 2004. However, a provider may renegotiate the terms and conditions of the settlement agreement at any time before the expiration of the settlement agreement.**

SECTION 24. IC 8-1-2.6-13 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 13. (a) As used in this section, "communications service" has the meaning set forth in IC 8-1-32.5-3.**

(b) As used in this section, "communications service provider" means a person or an entity that offers communications service to customers in Indiana, without regard to the technology or medium used by the person or entity to provide the communications service. The term includes a provider of commercial mobile service (as defined in 47 U.S.C. 332).

(c) As used in this section, "dark fiber" refers to unused capacity in a communications service provider's communications network, including fiber optic cable or other facilities:

(1) in place within a public right-of-way; but

(2) not placed in service by a communications service provider.

(d) Notwithstanding sections 1.2, 1.4, and 1.5 of this chapter, the commission may do the following both during and after the rate transition period described in section 1.3 of this chapter, except as otherwise provided in this subsection:

(1) Subject to section 12 of this chapter, enforce the terms of a settlement agreement approved by the commission before July 29, 2004. The commission's authority under this subdivision continues for the duration of the settlement agreement.

(2) Fulfill the commission's duties under IC 8-1-2.8 concerning the provision of dual party relay services to

hearing impaired and speech impaired persons in Indiana.

(3) Fulfill the commission's duties under IC 8-1-19.5 concerning the administration of the 211 dialing code for communications service used to provide access to human services information and referrals.

(4) Fulfill the commission's responsibilities under IC 8-1-29 to adopt and enforce rules to ensure that a customer of a telecommunications provider is not:

(A) switched to another telecommunications provider unless the customer authorizes the switch; or

(B) billed for services by a telecommunications provider that without the customer's authorization added the services to the customer's service order.

(5) Fulfill the commission's obligations under:

(A) the federal Telecommunications Act of 1996 (47 U.S.C. 151 et seq.); and

(B) IC 20-20-16;

concerning universal service and access to telecommunications service and equipment, including the designation of eligible telecommunications carriers under 47 U.S.C. 214.

(6) Perform any of the functions described in section 1.5(b) of this chapter.

(7) After June 30, 2009, perform the commission's responsibilities under IC 8-1-32.5 to:

(A) issue; and

(B) maintain records of;

certificates of territorial authority for communications service providers offering communications service to customers in Indiana.

(8) Perform the commission's responsibilities under IC 8-1-34 concerning the issuance of certificates of franchise authority to multichannel video programming distributors offering video service to Indiana customers.

(9) After June 30, 2009, require a communications service provider, other than a provider of commercial mobile service (as defined in 47 U.S.C. 332), to report to the commission on an annual basis, or more frequently at the option of the provider, any of the following information:

(A) Service quality goals and performance data. The commission shall make any information or data submitted under this subsection available:

(i) for public inspection and copying at the offices of the commission under IC 5-14-3; and

(ii) electronically through the computer gateway administered by the office of technology established by IC 4-13.1-2-1;

to the extent the information or data are not exempt from public disclosure under IC 5-14-3-4(a).

(B) Information concerning the:

(i) capacity;

(ii) location; and

(iii) planned or potential use of;

the communications service provider's dark fiber in Indiana.

(C) Information concerning the communications service offered by the communications service provider in Indiana, including:

(i) the types of service offered; and

(ii) the areas in Indiana in which the services are offered.

(D) Any information needed by the commission to prepare the commission's report to the regulatory flexibility committee under section 4 of this chapter.

(E) Any other information that the commission is authorized to collect from a communications service provider under state or federal law.

The commission may revoke a certificate issued to a communications service provider under IC 8-1-32.5 if the communications service provider fails or refuses to report any information required by the commission under this subdivision. However, this subdivision does not empower the commission to require a communications service provider to disclose confidential and proprietary business plans and other confidential information without adequate protection of the information. The commission shall exercise all necessary caution to avoid disclosure of confidential information supplied under this subdivision.

(10) Perform the commission's duties under IC 8-1-32.4 with respect to telecommunications providers of last resort, to the extent of the authority delegated to the commission under federal law to perform those duties.

(11) Perform the commission's duties under IC 8-1-2-5 with respect to interconnection.

(12) Establish and administer the Indiana Lifeline assistance

program under IC 8-1-36.

(13) After June 30, 2009, collect and maintain from a provider of commercial mobile service (as defined in 47 U.S.C. 332) the following information:

(A) The address of the provider's website.

(B) All toll free telephone numbers and other customer service telephone numbers maintained by the provider for receiving customer inquiries and complaints.

(C) An address and other contact information for the provider, including any telephone number not described in clause (B).

The commission shall make any information submitted by a provider under this subdivision available on the commission's website. The commission may also make available on the commission's website contact information for the Federal Communications Commission and the Cellular Telephone Industry Association.

(14) Fulfill the commission's duties under any state or federal law concerning the administration of any universally applicable dialing code for any communications service.

(e) After June 30, 2009, the commission does not have jurisdiction over any of the following with respect to a communications service provider:

(1) Rates and charges for communications service provided by the communications service provider, including the filing of schedules or tariffs setting forth the provider's rates and charges.

(2) Depreciation schedules for any of the classes of property owned by the communications service provider.

(3) Quality of service provided by the communications service provider, other than the imposition of a reporting requirement under subsection (d)(9)(A).

(4) Long term financing arrangements or other obligations of the communications service provider.

(5) Except as provided in subsection (d), any other aspect regulated by the commission under this title before July 1, 2009.

(f) After June 30, 2009, the commission has jurisdiction over a communications service provider only to the extent that jurisdiction is:

(1) expressly granted by state or federal law, including:

(A) a state or federal statute;

(B) a lawful order or regulation of the Federal Communications Commission; or

(C) an order or a ruling of a state or federal court having jurisdiction; or

(2) necessary to administer a federal law for which regulatory responsibility has been delegated to the commission by federal law.

SECTION 25. IC 8-1-2.6-14 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 14. This chapter does not affect the rights and obligations of any person or entity concerning the payment of switched network access rates or other carrier compensation concerning:**

(1) Internet Protocol enabled services;

(2) advanced services (as defined in 47 CFR 51.5);

(3) broadband service; or

(4) other Internet access services.

SECTION 26. IC 8-1-2.6-15 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 15. (a) Except as provided in subsection (b), if there is a conflict between this chapter and another provision of this article, this chapter controls.**

(b) This chapter does not affect the rights of:

(1) a provider that has withdrawn from the commission's jurisdiction under IC 8-1-2-88.5 or IC 8-1-17-22.5 before March 28, 2006, to remain outside the jurisdiction of the commission during the transition period described in section 1.3 of this chapter; or

(2) a provider that:

(A) has not withdrawn from the commission's jurisdiction under IC 8-1-2-88.5 or IC 8-1-17-22.5 before March 28, 2006; and

(B) is otherwise eligible to withdraw from the commission's jurisdiction under IC 8-1-2-88.5 or IC 8-1-17-22.5;

to withdraw from the commission's jurisdiction under IC 8-1-2-88.5 or IC 8-1-17-22.5 at any time during the transition period described in section 1.3 of this chapter.

Except as provided in section 13(d)(5) of this chapter, after June 30, 2009, section 1.4 of this chapter applies to a provider described in this subsection.

SECTION 27. IC 8-1-2.6-16 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE

UPON PASSAGE]: **Sec. 16. (a) As used in this section, "payphone service provider" means an entity, other than an incumbent local exchange carrier, that owns and operates:**

(1) public or semipublic pay telephones; or

(2) pay telephones used to provide telephone service in correctional institutions.

(b) Notwithstanding any other statute, the commission shall retain jurisdiction to establish just and reasonable rates that may be charged by an incumbent local exchange carrier to a payphone service provider. Rates established under this section must be:

(1) based on the costs incurred by the incumbent local exchange carrier to provide the service;

(2) consistent with the requirements of 47 U.S.C. 276;

(3) nondiscriminatory; and

(4) consistent with the pricing guidelines for payphone service providers established by the Federal Communications Commission.

SECTION 28. IC 8-1-2.8-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. (a) As used in this chapter, "dual party relay services" means ~~telephone~~ **telecommunications** transmission services that provide the ability for a person who has a hearing impairment or speech impairment to engage in communication ~~by wire or radio~~ with a hearing person in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services. ~~by wire or radio.~~

(b) The term includes services that enable two-way communication between a person who uses a telecommunications device for the deaf or other nonvoice terminal and a person who does not use such a device.

SECTION 29. IC 8-1-2.8-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 8. As used in this chapter, "local exchange ~~telephone~~ company" or "LEC" ~~means a company authorized by the commission to provide, among other services, local exchange access service.~~ **refers to any communications service provider (as defined in IC 8-1-2.6-13(b)) that:**

(1) has a certificate of territorial authority on file with the commission; and

(2) is required to provide dual party relay services to hearing impaired and speech impaired persons under federal law.

SECTION 30. IC 8-1-2.8-10 IS AMENDED TO READ AS

FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 10. The general assembly finds and declares the following:

(1) That it is in the public interest of the state to promptly provide hearing impaired or speech impaired persons with access to ~~telephone~~ **telecommunications** services that are functionally equivalent to those provided to hearing persons.

(2) That Title IV of the ADA mandates that each telephone company providing telephone service within the state must provide dual party relay services on or before July 26, 1993, to hearing impaired and speech impaired persons within the territorial area or areas it serves in a manner that meets or exceeds the requirements of regulations prescribed by the FCC.

(3) That the most efficient, cost effective, and fair method for LECs to provide dual party relay services to hearing impaired and speech impaired persons and to comply with the federal mandate without the use of tax revenues is the establishment of the Indiana Telephone Relay Access Corporation for the Hearing and Speech Impaired under this chapter.

(4) That the provision of dual party relay services to hearing impaired and speech impaired persons can be enhanced by providing in appropriate circumstances in the sole discretion of the InTRAC telecommunications devices that facilitate access to the dual party relay services.

SECTION 31. IC 8-1-2.8-18 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 18. The articles of incorporation of the InTRAC must provide the following:

(1) The name of the corporation shall be "Indiana Telephone Relay Access Corporation for the Hearing and Speech Impaired".

(2) The sole purpose for which the InTRAC shall be organized and operated is to provide at the lowest cost reasonably possible:

(A) on behalf of ~~telephone companies~~ **LECs** and the citizens of Indiana; and

(B) in conjunction with ~~telephone companies;~~ **LECs;**

adequate and dependable dual party relay services that may include in appropriate circumstances in the sole discretion of the InTRAC telecommunications devices to hearing impaired and speech impaired persons within the territorial area **in Indiana** that ~~telephone companies~~ **LECs** serve in a manner that meets or exceeds the requirements of regulations prescribed by the FCC.

(3) The InTRAC must have authority to perform any lawful act that is necessary, convenient, or expedient to accomplish the purpose for which the InTRAC is formed.

(4) No part of the net earnings of the InTRAC may inure to the benefit of any member, director, or officer of the InTRAC, nor shall any member of the InTRAC receive any earnings from the corporation except as follows:

(A) A member may be an independent contractor, a supplier, a vendor, or an authorized agent of the InTRAC and may receive fair and reasonable compensation for the member's provision of goods or services.

(B) An officer may receive reasonable compensation for services that the officer performs in the officer's capacity as an officer of the InTRAC.

(C) A director may be reimbursed for expenses incurred by the director in the performance of the director's duties.

(5) The InTRAC may not:

(A) make an advancement for services to be performed in the future; or

(B) make a loan of money or property to any director or officer of the corporation.

(6) No member, director, or officer of the InTRAC or any private individual may share in the distribution of any of the assets of the InTRAC upon its dissolution.

(7) If there is a dissolution of the InTRAC, any of the assets of the InTRAC available for distribution shall be distributed to a charity:

(A) selected by the board of directors of the InTRAC; and

(B) having a purpose that includes providing services to hearing impaired and speech impaired persons.

(8) The InTRAC shall have one (1) class of members consisting of those ~~telephone companies~~ **communications service providers** that are designated as authorized LECs by the commission.

(9) Each member of the InTRAC shall serve as a member for as long as the commission finds that the member is a LEC. A member's:

(A) right to vote at meetings of the members of the InTRAC; and

(B) right, title, and interest in or to the corporation;

cease on the termination of a member's membership.

(10) Each member present in person or by proxy at a meeting of the members of the InTRAC may cast one (1) vote upon each question voted upon at:

(A) all meetings of the members; and

(B) in any election of a director of the InTRAC.

(11) The board of directors of the InTRAC consists of seven (7) directors selected as follows:

(A) Six (6) directors elected by the members of the InTRAC.

(B) The director of the state office of deaf and hearing impaired services.

(12) The business, property, and affairs of the InTRAC are managed and controlled by the board of directors of the InTRAC.

SECTION 32. IC 8-1-2.8-20 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 20. (a) In pursuit of its purpose, the InTRAC may do the following:

(1) Perform audits and tests of the accounts of a LEC to verify the amounts described in section 12 of this chapter.

(2) Provide by contract dual party relay services to ~~telephone companies~~ **communications service providers** operating outside ~~of the state~~ **Indiana** if the effect of the contract:

(A) is to decrease the amount of surcharges imposed on the customers of members of the InTRAC; and

(B) does not sacrifice the quality of service that InTRAC provides for those customers in the absence of a contract.

(b) The actions described in subsection (a) are examples and are not intended to limit in any way the scope or types of actions that the InTRAC may take in pursuit of its purposes.

SECTION 33. IC 8-1-2.8-21 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 21. The InTRAC shall do the following:

(1) Establish, implement, and administer, in whole or in part, a statewide dual party relay service system. Any contract for the supply or operation of a dual party relay service system or for the supply of telecommunications devices shall be provided through a competitively selected vendor.

(2) Determine the terms and manner in which each LEC shall pay to the InTRAC the surcharge required under this chapter.

(3) Annually review the costs it incurred during prior periods, make reasonable projections of anticipated funding requirements for future periods, and file a report of the results of the review and projections with the commission by May 1 of each year.

(4) Annually employ an independent accounting firm to prepare audited financial statements for the end of each fiscal year of the InTRAC to consist of:

(A) a balance sheet;

(B) a statement of income; and

(C) a statement of cash flow;

and file a copy of these financial statements with the commission before May 2 of each year.

(5) Enter into contracts with any ~~telephone company authorized by the commission to provide services within Indiana~~ **LEC** to provide dual party relay services for the ~~telephone company,~~ **LEC,** upon request by the ~~telephone company.~~ **LEC.** However, the InTRAC:

(A) shall require reasonable compensation from the ~~telephone company~~ **LEC** for the provision of these services;

(B) is not required to contract with its members; and

(C) shall provide dual party relay services to InTRAC members **for communications service originating with the members' Indiana customers** for no consideration other than the payment to the InTRAC of the surcharges collected by the member under this chapter.

(6) Send to each of its members and file with the governor and the general assembly before May 2 of each year an annual report that contains the following:

(A) A description of the InTRAC's activities for the previous fiscal year.

(B) A description and evaluation of the dual party relay services that the InTRAC provides.

(C) A report of the volume of services the InTRAC provided during the previous fiscal year.

(D) A copy of the financial statements that subdivision (4) requires.

A report filed under this subdivision with the general assembly must be in an electronic format under IC 5-14-6.

SECTION 34. IC 8-1-2.8-22 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 22. If:

(1) a ~~telephone company~~ **communications service provider** that is not a member of InTRAC originates, carries, or terminates, in whole or in part, any telecommunication message that uses the InTRAC's dual party relay services; and

(2) refuses to:

(A) enter into a contract with the InTRAC as provided in section 21(5) of this chapter; or

(B) pay any sums due under such a contract;

the InTRAC may apply to the commission for an order requiring just and reasonable payments or the payments that are due under the contract. The InTRAC may enforce this order in the courts of the state.

SECTION 35. IC 8-1-2.8-23 IS AMENDED TO READ AS

FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 23. (a) If the InTRAC meets the requirements of sections 18 and 21 of this chapter, the InTRAC:

(1) is not a public utility;

(2) is not a telephone company **or a communications service provider;** and

(3) is free from the jurisdiction and oversight of the commission except as specifically provided in this chapter.

(b) The InTRAC is not an affiliated interest (as defined in IC 8-1-2-49). An officer, a director, or a member of the InTRAC may not be construed to be an affiliated interest solely because that person or entity is an officer, a director, or a member of the InTRAC.

SECTION 36. IC 8-1-2.8-25 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 25. The following are not liable in any civil action for any injuries or loss to persons or property incurred by any person as a result of any act or omission of any person or entity listed in subdivisions (1) through (3) in connection with the development, adoption, implementation, maintenance, or operation of any system that provides dual party relay services or telecommunications devices, except for injuries or losses incurred as a result of willful or wanton misconduct:

(1) The InTRAC.

(2) A ~~telephone company~~ **LEC** providing dual party relay services.

(3) An employee, a director, an officer, or an agent of an entity listed in subdivision (1) or (2).

SECTION 37. IC 8-1-2.9-0.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 0.5. As used in this chapter, "telecommunications service provider" means a person that offers telecommunications service (as defined in 47 U.S.C. 153(46)).**

SECTION 38. IC 8-1-2.9-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. As used in this chapter, "caller ID service" means an optional service provided by a ~~telephone company~~ **telecommunications service provider** that permits a ~~telephone~~ **telecommunications service** customer equipped with a display device to view the telephone number ~~of the telephone~~ from which a call is being placed before answering the ~~telephone.~~ **call.**

SECTION 39. IC 8-1-2.9-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 2. (a) The commission shall approve any ~~telephone company~~ petition **by a telecommunications service provider** for commission approval of

caller ID service. The commission may not require that caller ID service be provided with blocking, except that the commission may approve either per-call or per-line blocking for law enforcement and crisis intervention agencies that are certified by the commission.

(b) Rates and charges for caller ID services are not subject to commission approval **under this section.**

SECTION 40. IC 8-1-17-2.1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 2.1. (a) If the requirements of subsection (b) are met, a local cooperative telephone corporation formed under Acts 1935, c.157 is considered to have been formed under this chapter and is subject to its requirements and not the requirements of IC 23-7-1.1 (before its repeal August 1, 1991) or IC 23-17.

(b) A local cooperative telephone corporation described in subsection (a) shall amend its articles of incorporation in accordance with IC 23-7-1.1 (before its repeal August 1, 1991) or IC 23-17 to conform to the requirements of this chapter and shall submit a copy of its amended articles to the commission for approval. After examining the articles, the commission shall approve the amended articles if they conform to the requirements of this chapter. The commission may approve the amended articles without conducting a hearing. The secretary of state may not issue a certificate of amendment before the commission approves the amended articles under this subsection.

(c) The certificate of public convenience and necessity or certificate of territorial authority previously issued to a local cooperative telephone corporation described in subsection (a) shall serve as the certificate required under section 6 of this chapter **(before its repeal July 1, 2009).**

(d) Subsection (a) applies to a local telephone cooperative corporation as of the date the secretary of state issues a certificate of amendment under IC 23-7-1.1-26 (before its repeal August 1, 1991) or IC 23-17-17.

(e) The local cooperative telephone corporation shall record the amended articles of incorporation in the county where the local cooperative telephone corporation has its principal office.

SECTION 41. IC 8-1-17-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. As used in this chapter, the following terms have the following meanings unless a different meaning clearly appears from the context:

(1) "Acquire" means to obtain by construction, purchase, lease, devise, gift, eminent domain, or by any other lawful means.

(2) "Board" means the board of directors of a cooperative

corporation.

(3) "Cooperative corporation" means a corporation formed under this chapter.

(4) "Facilities based local exchange carrier" has the meaning set forth in IC 8-1-32.4-5.

~~(4)~~ **(5)** "General cooperative corporation" means a cooperative corporation formed to render services to local cooperative corporations.

~~(5)~~ **(6)** "Improve" includes construct, reconstruct, extend, enlarge, alter, better, or repair.

~~(6)~~ **(7)** "Local cooperative corporation" means a cooperative corporation formed to render telephone services within Indiana.

~~(7)~~ **(8)** "Member" includes each individual signing the articles of incorporation of a cooperative corporation and each person admitted to membership of the cooperative corporation under law or the corporation's bylaws.

~~(8)~~ **(9)** "Obligations" includes negotiable bonds, notes, debentures, interim certificates or receipts, and other evidences of indebtedness, either issued or the payment of which is assumed by a cooperative corporation.

~~(9)~~ **(10)** "Person" or "inhabitant" includes an individual, a firm, an association, a corporation, a limited liability company, a business trust, and a partnership.

~~(10)~~ **(11)** "Service" or "services", when not accompanied by the word "telephone", means construction, engineering, financial, accounting, or educational services incidental to telephone service.

~~(11)~~ **(12)** "System" includes any plant, works, system, facilities, or properties, together with all parts of and appurtenances to the plant, works, system, facilities, or properties, used or useful in telephone service.

~~(12) "Telephone company" means an individual, a firm, an association, a corporation, or a partnership owning, leasing, or operating any lines, facilities, or systems used in the furnishing of telephone service within Indiana.~~

(13) "Telephone facilities" includes all buildings, plants, works, structures, improvements, fixtures, apparatus, materials, supplies, machinery, tools, implements, poles, posts, crossarms, conduits, ducts, underground or overhead lines, wires, cables, exchanges, switches, desks, testboards, frames, racks, motors, generators, batteries, and other items of central office equipment, paystations, protectors, instruments, connections, and appliances, office

furniture and equipment, work equipment, and all other property used in connection with the provision of telephone ~~service.~~ **and other telecommunications services.**

(14) "Telephone service" ~~means that~~ **refers to telecommunications** service **(as defined in 47 U.S.C. 153(46))** provided by a telephone cooperative corporation. ~~whereby the transmission of intelligence between at least two (2) points through the use of electricity is the intended use.~~ The term includes all ~~telephone~~ facilities or systems used in the rendition of the service.

SECTION 42. IC 8-1-17-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 5. (a) The individuals executing the articles of incorporation of a local cooperative corporation shall be residents of the area in which the operations of the cooperative corporation are to be conducted and shall be persons desirous of using telephone service to be furnished by the cooperative corporation.

(b) The individuals executing the articles of incorporation of a general cooperative corporation shall be members or prospective members of one (1) or more local cooperative corporations which are prospective members of such general cooperative corporation.

(c) The articles shall be executed in at least six (6) originals and shall be acknowledged by the subscribers before an officer authorized by law to take acknowledgments of deeds. When so acknowledged, three (3) originals of said articles shall be submitted to the commission. At the time the articles of incorporation are filed, ~~a petition~~ **an application for a certificate of territorial authority under IC 8-1-32.5** shall be filed with the commission ~~which petition~~ **if the applicant will operate as a local cooperative corporation. The application** shall be executed by one (1) or more of the individuals executing the ~~said~~ articles, and shall ~~pray the commission to grant a certificate of public convenience and necessity for the organization and operation of the proposed cooperative corporation.~~ **comply with the requirements of IC 8-1-32.5-6, as applicable.**

(d) Upon the ~~submission~~ **receipt** of ~~such~~ **any** articles ~~to, and filing of such petition with,~~ **of incorporation and application for a certificate of territorial authority,** the commission ~~it~~ shall ~~set the said petition for public hearing and give notice of the time, place and purpose thereof by publication in at least one (1) newspaper printed and published in each of the counties in which the said cooperative corporation proposed to operate. The publication shall be at least ten (10) days prior to the date set for said hearing. The cost of such~~

~~publication shall be paid by the petitioners at or before the time of such hearing.~~ **conduct the review required under IC 8-1-32.5-8.** If ~~it be~~ **the applicant is** a local cooperative corporation, ~~in addition to such published notice,~~ the commission shall give written notice, by United States registered mail, of the ~~time, place and purpose of such hearing,~~ **filing of the application** to each ~~telephone company~~ **facilities based local exchange carrier** operating in territory contiguous to the area in which the ~~respective~~ cooperative corporation ~~proposed~~ **proposes** to render telephone service. The commission shall ~~keep maps or records from which it can readily ascertain which telephone companies should receive notice as last provided, and information so available shall be used in the mailing of the aforesaid notices.~~ **use the record maintained by the commission under IC 8-1-32.5-13 to determine which facilities based local exchange carriers are entitled to notice under this subsection.**

(e) ~~Any interested person may appear at such hearing, either in person or by attorney, and support or oppose the prayer of said petition.~~ **If** the commission, after ~~hearing the evidence introduced at said~~ **conducting the review required by IC 8-1-32.5-8 and any** hearing ~~shall enter a finding that the convenience and necessity of the public proposed to be served in the territory in which the operations of the cooperative corporation are proposed to be conducted either will or will not be served by the organization and operation of the proposed cooperative corporation. If such finding be in the affirmative,~~ **allowed under IC 8-1-32.5-9, determines that the applicant meets the requirements for the issuance of a certificate of territorial authority under IC 8-1-32.5-8,** the commission shall:

(1) issue a certificate of territorial authority under IC 8-1-32.5; and

(2) enter an order approving the organization of ~~such~~ **the** cooperative corporation and the proposed articles of incorporation.

(f) If ~~the said finding be in the negative,~~ the commission, **after conducting the review required by IC 8-1-32.5-8 and any hearing allowed under IC 8-1-32.5-9, determines that the applicant does not meet the requirements for the issuance of a certificate of territorial authority under IC 8-1-32.5-8, the commission** shall: ~~enter an order denying the approval of said articles of incorporation.~~

(1) request the applicant to provide additional information; or

(2) notify the applicant of the applicant's right to:

(A) appeal the commission's determination under IC 8-1-3; or

(B) file another application at a later date, without prejudice;

under IC 8-1-32.5-8.

~~(f)~~ **(g)** If the commission approves the ~~said~~ articles of incorporation ~~as provided in~~ **under** subsection (e), the **cooperative corporation shall submit the following documents, along with two (2) copies of each, to the secretary of state for filing:**

(1) One (1) of the original articles of incorporation ~~together with an attached~~ **executed by the corporation under subsection (c).**

(2) A certified copy of the order of the commission ~~shall be proffered in triplicate to the secretary of state for filing in his office. After~~ **under subsection (e)(2).**

(3) A certified copy of the certificate of territorial authority issued by the commission under subsection (e)(1).

If the secretary of state ~~finds said articles and order~~ **determines that the documents described in subdivisions (1) through (3)** comply with law, ~~he~~ **the secretary of state** shall ~~forthwith~~ endorse ~~his approval thereon~~ **the documents** and file one (1) set of ~~such articles and order~~ **the documents** in ~~his~~ **the secretary of state's** office and deliver the other two (2) sets, ~~thereof,~~ **endorsed** with ~~his~~ **the secretary of state's** approval, ~~endorsed thereon,~~ to the incorporators. The incorporators shall record one (1) of the approved ~~originals~~ **original or certified copies** of ~~said articles with attached certified copy of~~ the ~~commission's order~~ **documents** in the office of the recorder of the county in which the cooperative corporation has, or ~~is to~~ **will** have, its principal office.

~~(g)~~ **(h)** As soon as the provisions of this section have been complied with, the proposed cooperative corporation, described in the articles of incorporation ~~so~~ recorded **under subsection (g),** under its designated name, ~~shall be~~ **is** a body corporate.

SECTION 43. IC 8-1-17-13 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 13. A cooperative corporation may do any and all acts or things necessary or convenient for carrying out the purpose for which it was formed, including the following:

(1) To sue and be sued.

(2) To have a seal and alter the same at pleasure.

(3) To acquire, hold, and dispose of property, real and personal, tangible and intangible, or any interest in the property and to pay in cash or credit, and to secure and procure payment of all or any part of the purchase price on the terms and conditions as the board shall determine.

(4) If it is a local cooperative corporation, to furnish, improve, and

expand telephone service to its members, to governmental agencies and political subdivisions, and to other persons.

(5) If it is a local cooperative corporation, to construct, purchase, lease as lessee, or otherwise acquire, and to improve, expand, install, equip, maintain, and operate, and to sell, assign, convey, lease as lessor, mortgage, pledge, or otherwise dispose of or encumber telephone facilities or systems, lands, buildings, structures, plants and equipment, exchanges, and any other real or personal property, tangible or intangible which ~~shall be deemed~~ **is** necessary or appropriate to accomplish the purpose for which the local cooperative corporation is organized.

(6) To cease doing business and to dissolve and surrender its corporate franchise.

(7) If it is a local cooperative corporation, to construct, operate, and maintain its telephone facilities across or along any street or public highway, or over lands that are the property of this state or a political subdivision of the state. Before telephone facilities are constructed across or along a highway in the state highway system, the local cooperative corporation shall first obtain the permit of the Indiana department of transportation to do so, and the location and setting of the telephone facilities shall be approved by and subject to the supervision of the Indiana department of transportation. Before telephone facilities are constructed on or across land belonging to the state, the local cooperative corporation shall first obtain the permit of the department of state having charge of the lands to do so, and the location and setting of the telephone facilities shall be approved by and subject to the supervision of the department. The telephone facilities shall be erected and maintained so as not to interfere with the use and maintenance of the streets, highways, and lands, and no pole or appliance shall be located so as to interfere with the ingress or egress from any premises on the street or highway. Nothing in this section contained shall deprive the body having charge of the street or highway of the right to require the relocation of any pole or appliance which may affect the proper use of the street or highway for public travel, for drainage, or for the repair, construction, or reconstruction of the street or highway. The local cooperative corporation shall restore the street, highway, or lands to ~~its~~ **their** former condition or state as near as may be and shall not use the same in a manner to impair unnecessarily ~~its~~ **their** usefulness or to injure the property of others.

(8) To accept gifts or grants of property, real or personal, from any person, municipality, or federal agency and to accept voluntary and uncompensated services.

(9) If it is a local cooperative corporation, to connect and interconnect its telephone facilities or systems with other telephone facilities or systems. A connection or interconnection shall be in a manner and according to specifications as will avoid interference with or hazards to existing telephone facilities or systems.

(10) To issue membership certificates.

(11) To borrow money and otherwise contract indebtedness, and to issue or guarantee notes, bonds, and other evidences of indebtedness and to secure the payment thereof by mortgage, pledge, or deed of trust of, or any other encumbrance upon, any or all of its then owned or after-acquired real or personal property, assets, franchises, or revenues.

(12) To make any and all contracts necessary or convenient for the full exercise of the powers in this chapter granted, including, without limiting the generality of the foregoing, contracts with any person, federal agency, municipality, or other corporation for the interconnection of telephone service; for the management and conduct of the business of the cooperative corporation; **and** for the fixing of the rates, fees, or charges for service rendered or to be rendered by the local cooperative corporation. ~~subject to the approval of the commission as to all rates, fees, or charges for telephone service in the same manner and to the same extent as is provided by law for the regulation of rates, fees, or charges of telephone companies.~~

(13) To levy and collect reasonable fees, rents, tolls, and other charges for telephone service rendered. ~~subject to the approval of the commission as provided in this section.~~

(14) If it is a local cooperative corporation, to exercise the right of eminent domain in the manner provided by law for the exercise thereof by ~~telephone companies.~~ **communications service providers (as defined in IC 8-1-2.6-13(b)).**

(15) To adopt, amend, and repeal bylaws.

(16) If it is a local cooperative corporation, to become a member of a general cooperative corporation and if it is a general cooperative corporation, to have local cooperative corporations as its members.

(17) To recover, after a period of two (2) years, any unclaimed stocks, dividends, capital credits, patronage refunds, utility

deposits, membership fees, account balances, or book equities for which the owner cannot be found and are the result of distributable savings of the corporation returned to the members on a pro rata basis pursuant to section 20 of this chapter.

SECTION 44. IC 8-1-17-14 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 14. ~~No~~ **A** local cooperative corporation may **not** sell, lease, exchange, mortgage, pledge, or otherwise sell all, or substantially all, of its property unless the ~~same shall be~~ **transaction is** authorized by a resolution duly adopted at a meeting of ~~its~~ **the corporation's** members duly called and held as provided in section 9 of this chapter. ~~which~~ **The** resolution ~~shall have received~~ **must receive** the affirmative vote of at least three-fourths (3/4) of ~~its~~ **the corporation's** members who are present at ~~such~~ **the** meeting and the affirmative vote of at least three-fourths (3/4) of ~~its~~ **the corporation's** directors who are present at a meeting of ~~its~~ **the** board of directors duly called and held as provided in ~~its~~ **the corporation's** bylaws. ~~and subject to the approval of the commission as provided by law applicable to a similar transaction by a public utility.~~

SECTION 45. IC 8-1-17-15 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 15. (a) ~~Subject to the approval of the commission~~ A cooperative corporation shall have power and is hereby authorized, from time to time, to issue its obligations for any corporate purpose. ~~Said~~ **The** obligations may be authorized by resolution or resolutions of the board, and may bear such date or dates, mature at such time or times, not exceeding forty (40) years from their respective dates, bear interest at any rate, payable semi-annually, be in such denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption, not exceeding the principal amount ~~thereof~~ **of the obligations** plus accrued interest, as ~~such~~ **the board's** resolution or resolutions may provide.

(b) ~~Such~~ **The** obligations may be sold in such manner and upon such terms as the board may determine at not less than the principal amount ~~thereof~~ **of the obligations** plus accrued interest.

(c) Any provision of law to the contrary notwithstanding, any obligations and ~~the~~ **related** interest coupons, ~~appertaining thereto,~~ if any, issued pursuant to this act shall possess all the qualities of negotiable instruments. ~~however,~~ The commission's approval shall not be required for the issuance by a cooperative corporation of its bonds, notes, or other evidences of indebtedness. ~~which are:~~

~~(1) payable in less than one (1) year from date of execution; and (2) in the aggregate do not exceed ten per cent (10%) of its net plant account.~~

SECTION 46. IC 8-1-17-18 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 18. (a) Any two (2) or more cooperative corporations created under the provisions of this chapter and operating or authorized to operate in contiguous territory may enter into an agreement for the consolidation of ~~such~~ **the** cooperative corporations, which agreement shall be submitted for the ~~approval~~ **review** of the commission in the manner provided for in section 5 of this chapter. ~~Such~~ **The** agreement shall set forth the terms and conditions of the consolidation, the name of the proposed consolidated cooperative corporation, the number of its directors, not less than three (3), the time of the annual election, and the names of the persons, not less than three (3), to be directors until the first annual meeting. Each ~~such~~ cooperative corporation **participating in the consolidation** shall duly call and hold a meeting of its members, as provided in section 9 of this chapter, at which the proposal of ~~such~~ **the** consolidation shall be presented. If at each ~~such~~ meeting, the ~~aforesaid~~ **consolidation** agreement is approved by a resolution duly adopted and receiving the affirmative vote of at least three-fourths (3/4) of the members ~~of the respective cooperative corporation,~~ who attend ~~such~~ **each** meeting, the directors named in the agreement shall subscribe and acknowledge articles conforming substantially to the original articles of incorporation. ~~except that it~~ **The new articles** shall be entitled and endorsed "Articles of Consolidation of _____" (the blank space being filled in with the names of the cooperative corporations being consolidated) and ~~shall~~ **must** state:

(1) the names of the cooperative corporations being consolidated;

(2) the name of the consolidated cooperative corporation;

(3) a statement that each consolidating cooperative corporation agrees to the consolidation;

(4) the names and addresses of the directors of the new cooperative corporation; and

(5) the terms and conditions of the consolidation and the mode of carrying the ~~same~~ **consolidation** into effect, including the manner in which members of the consolidating cooperative corporations may or shall become members of the new cooperative corporation.

~~and~~ **The new articles of incorporation** may contain any provisions not inconsistent with this chapter ~~deemed~~ **that are** necessary or advisable for the conduct of the business of the new cooperative corporation.

(b) ~~If~~ **After** the commission approves the ~~said~~ articles of consolidation ~~such~~ **under section 5 of this chapter, the** articles of consolidation or a certified copy or copies ~~thereof~~ **of the articles** shall be filed, together with the attached copy of the order of the commission **under section 5(e)(2) of this chapter,** in the same place as original articles of incorporation. ~~and thereupon~~ **Upon the filings required under section 5(g) of this chapter,** the proposed consolidated cooperative corporation, under its designated name, ~~shall be and constitute~~ **is** a body corporate with all the powers of a cooperative corporation as originally formed under this chapter. ~~If the commission does not approve the said articles of consolidation, permission for such consolidation shall be denied by the commission.~~

SECTION 47. IC 8-1-17-19 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 19. (a) In case of a consolidation, the existence of the consolidating cooperative corporations shall cease and the articles of consolidation ~~shall be deemed to be~~ **are considered** the articles of incorporation of the new cooperative corporation.

(b) All rights, privileges, immunities, and franchises and all property, real and personal, including without limitation applications for membership, all debts due on whatever account and all other choses in action, of each of the consolidating cooperative corporations ~~shall be deemed to be~~ **are** transferred to and vested in the new cooperative corporation without further act or deed.

(c) The new cooperative corporation shall be responsible and liable for all the liabilities and obligations of each of the consolidating cooperative corporations. Any claim existing or action or proceeding pending by or against any of the consolidating cooperative corporations may be prosecuted as if the consolidation had not taken place but the new cooperative corporation may be instituted in its place.

(d) The new cooperative corporation ~~shall be authorized to~~ **may** operate in all the areas in which the consolidating cooperative corporations ~~shall have been~~ **were** authorized to operate. ~~and shall not be authorized to~~ **Before the new corporation may** operate in any other area, ~~until or unless so authorized by~~ **it shall submit to the commission:**

(1) an application for a new certificate of ~~public convenience and necessity issued by the commission as provided in section 6 of this chapter.~~ **territorial authority under IC 8-1-32.5; or**

(2) a notice of change under IC 8-1-32.5-12(7), as allowed by the commission.

(e) ~~Neither~~ The rights of creditors ~~nor~~ **and** any liens upon the

property of any ~~such~~ **consolidating** cooperative corporations shall **not** be impaired by ~~such consolidations.~~ **the consolidation.**

SECTION 48. IC 8-1-17-20 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 20. (a) A local cooperative corporation shall be required to furnish reasonably adequate telephone services and facilities. The charge made by any local cooperative corporation for any service rendered or to be rendered, either directly or in connection ~~therewith,~~ **with the service,** shall be nondiscriminatory, reasonable, and just, and every discriminatory, unjust, or unreasonable charge for telephone service is prohibited and declared unlawful. ~~A~~ Reasonable and just ~~charge~~ **charges** for telephone service within the meaning of this section ~~shall be such~~ **are those** charges ~~as shall~~ **that** produce sufficient revenue to pay all legal and other necessary expense incident to the operation of the local cooperative corporation's system, ~~to include, but not limited to,~~ **including** maintenance costs, operating charges, upkeep, repairs, interest charges on bonds or other obligations, to provide a sinking fund for the liquidation of bonds or other evidences of indebtedness, to provide adequate funds to be used as working capital, as well as funds for making extensions and replacements, and also for the payment of any taxes that may be assessed against ~~such~~ **the** cooperative corporation or its property. ~~it being the intent and purpose hereof that such~~ Charges ~~shall~~ **described in this section must** produce an income sufficient to maintain ~~such~~ **the** local cooperative corporation's property in sound physical and financial condition to render adequate and efficient service. Any rate too low to meet the foregoing requirements ~~shall be~~ **is** unlawful. Revenues and receipts not needed for the ~~above and foregoing~~ purposes **described in this section,** or not needed in reserves for ~~such~~ **those** purposes, shall be returned to the patrons on a pro rata basis according to the amounts paid by them for telephone service. ~~such returns~~ **Amounts returned under this section** shall be either in cash or in abatement of current charges for telephone service, as the board may decide.

(b) As used in ~~subsections~~ **subsection** (d), ~~and (e),~~ "financial assistance" means:

(1) a loan or loan guarantee; or

(2) a lien accommodation provided to secure a loan made by another lender;

including ~~but not limited to~~ loans made by the Rural Electrification Administration of the United States Department of Agriculture (REA) or by the Rural Telephone Bank.

(c) As used in subsections (d) and (e), "REA borrower" means a

corporation created under this chapter that is the recipient of financial assistance.

(d) In determining rates under this section, ~~once the commission determines that property of an REA borrower is reasonably necessary for the provision of telephone service and has been placed in service, the commission shall approve rates to be charged by the~~ **an** REA borrower **must charge rates** sufficient to enable the REA borrower to:

(1) satisfy its reasonable expenses and obligations; and

(2) repay the full amount of any financial assistance and the interest thereon.

(e) So long as there remains any unpaid portion of any financial assistance associated with the property of an REA borrower, ~~determined under subsection (d) to be reasonably necessary and placed in service,~~ the rates of the REA borrower shall be set at a level sufficient to repay the financial assistance, regardless of ~~any change in the regulatory status of the property, including, without limitation,~~ the full or partial retirement of the property or any other change in the status of the property. ~~as reasonably necessary or used and useful.~~

SECTION 49. IC 8-1-17-23 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 23. (a) A cooperative corporation may amend its articles of incorporation to change its corporate name, to increase or reduce the number of its directors, or **to** change any other provisions ~~therein, provided, that~~ **set forth in the articles. However,** any change of location of the principal office ~~may~~ **shall** be effected in the manner set forth in section 24 of this chapter. ~~and further provided that no cooperative corporation shall amend its articles of incorporation to embody therein any purpose, power, or provision which would not be authorized if its original articles of incorporation, including such additional or changed purpose, power, or provision, were offered for filing at the time articles under this section are offered. Such~~ **An** amendment **under this section** may be accomplished by filing articles of amendment, ~~which~~ **along with any notice of change required under IC 8-1-32.5-12, with the commission. The articles of amendment** shall be entitled and endorsed "Articles of Amendment of _____" (the blank space being filled in with the name of the cooperative corporation) and ~~state.~~ **must include the following:**

(1) The name of the cooperative corporation, and if it has been changed, the name under which it was originally incorporated.

(2) The date of filing the articles of incorporation in each public office where filed.

(3) Whether the statement of counties within which ~~its~~ **the**

corporation's operations are to be conducted is to be changed, and if so ~~the~~ **a** new statement of ~~such~~ **the** counties **in which the corporation will operate.**

(4) ~~The officer executing such articles of amendment shall make and annex thereto~~ An affidavit, **signed by the officer executing the articles of amendment,** stating that the provisions of this section ~~in respect to the amendment set forth in such articles~~ were complied with.

(b) ~~Such~~ **The amended** articles shall be subscribed in the name of the cooperative corporation by the appropriate officers of the cooperative corporation, who shall make and annex an affidavit stating that they have been authorized to execute and file ~~such~~ **the amended** articles by a resolution duly adopted at a meeting of the cooperative corporation duly called and held as provided in section 9 of this chapter. If by any ~~such~~ amendment to **the** articles of incorporation, the territory proposed to be served by the cooperative corporation is to be increased or decreased, ~~the articles of amendment, together with a petition executed by~~ the appropriate officers of the cooperative corporation ~~and praying for the permission of the commission~~ shall ~~be submitted~~ **submit** to the commission: ~~Thereupon,~~

(1) an application for a new certificate of territorial authority under IC 8-1-32.5-6; or

(2) a notice of change under IC 8-1-32.5-12(7), as allowed by the commission.

(c) Upon receipt of an application or a notice of change under subsection (b), the commission shall ~~set said petition for public hearing and shall give notice of the time and place thereof one (1) time in at least one (1) newspaper published in each of the counties in which lies any of the territory proposed to be added or omitted by such amendment, which publication shall be at least ten (10) days before such hearing. The cost of publication shall be paid by the petitioner when filing such petition. Also~~ **conduct the review required under IC 8-1-32.5-8. If the applicant is a local cooperative corporation, the commission shall give** written notice of the ~~time and place of such hearing shall be mailed~~ **proposed change in the corporation's territory** to each ~~telephone company~~ **facilities based local exchange carrier** operating in contiguous territory in the manner provided in section 5 of this chapter. ~~Any interested person may appear, personally or by attorney, at such hearing and aid or oppose the prayer of the petition. After such hearing, the commission shall grant or deny the petition and make its order accordingly. No~~ **If the commission, after conducting the review required by IC 8-1-32.5-8 and any hearing**

allowed under IC 8-1-32.5-9, determines that the amended articles and the application or notice of change under IC 8-1-32.5 are accurate, complete, and properly verified, the commission shall:

(1) issue a new or amended certificate under IC 8-1-32.5 that reflects the increase or decrease in the territory served by the corporation; and

(2) enter an order approving the amended articles of the cooperative corporation.

(d) If the commission, after conducting the review required by IC 8-1-32.5-8 and any hearing allowed under IC 8-1-32.5-9, determines that the amended articles or an application or notice of change under IC 8-1-32.5 are inaccurate, incomplete, or not properly verified, the commission shall:

(1) request the corporation to provide additional information; or

(2) notify the corporation of the corporation's right to:

(A) appeal the commission's determination under IC 8-1-3; or

(B) file the amended articles or an application or notice of change under IC 8-1-32.5 at a later date, without prejudice;

under IC 8-1-32.5-8.

(e) An amendment increasing or decreasing the territory to be served by ~~such~~ **a** cooperative corporation shall **not** be filed in the office of the secretary of state or of any county recorder unless there ~~be~~ **is** attached ~~thereto~~ **to the amendment** a certified copy of an order of the commission ~~consenting to such increase or decrease. Such~~ **under subsection (c)(2). The amended** articles shall be filed in the same places as the original articles of incorporation and ~~thereupon~~ **upon filing** the amendment shall be ~~deemed~~ **considered** to have been effected.

SECTION 50. IC 8-1-17-24 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 24. A cooperative corporation formed ~~hereunder~~ **under this chapter** may change the location of its principal office by filing in the office of the secretary of state a certificate reciting ~~such~~ **the** change of principal office and setting forth the resolution by its board of directors authorizing ~~such~~ **the** change and stating the time and place of its adoption. ~~which~~ **The** certificate shall be executed and acknowledged by the appropriate officers of the cooperative corporation with the corporate seal attached and attested by the appropriate officer of the cooperative corporation. **The cooperative corporation shall also notify the commission of the**

change as required under IC 8-1-32.5-12(3).

SECTION 51. IC 8-1-17-25 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 25. **(a)** Any cooperative corporation may dissolve by filing in the office of the secretary of state articles of dissolution ~~which shall be~~ entitled and endorsed "Articles of Dissolution of _____" (the blank space being filled in with the name of the cooperative corporation). ~~and~~ **The articles of dissolution** shall state **the following:**

(1) The name of the cooperative corporation, and if ~~such~~ **the** cooperative corporation is a corporation resulting from ~~the~~ **a** consolidation as provided in this chapter, the names of the original cooperative corporations.

(2) The date of filing of the articles of incorporation in the office of secretary of state and, if ~~such~~ **the** cooperative corporation is a corporation resulting from a consolidation as provided in this chapter, the dates on which the articles of incorporation of the original cooperative corporations were filed in the office of secretary of state.

(3) That the cooperative corporation elects to dissolve.

(4) The name and post office address of each of its directors, and the name, title, and post office address of each of its officers.

~~Such~~ **The** articles shall be subscribed and acknowledged by the appropriate officers of the cooperative corporation who shall make and annex an affidavit stating that they have been authorized to execute and file ~~such~~ **the** articles by a resolution duly adopted by the members of the cooperative corporation at a meeting ~~thereof~~ duly called and held as provided in section 9 of this chapter. Articles of dissolution or a certified copy or copies ~~thereof~~ **of the articles** shall be filed in the same places as original articles of incorporation. ~~and thereupon~~ **If the dissolving corporation is a local cooperative corporation, any certificate of territorial authority issued under IC 8-1-32.5 shall be relinquished, and the appropriate officers of the corporation shall notify the commission of the relinquishment under IC 8-1-32.5-12(5).**

(b) Upon the filings required by subsection (a), the cooperative corporation ~~shall be deemed to be~~ **is** dissolved. ~~Such~~ **However, the** cooperative corporation shall continue for the purpose of paying, satisfying, and discharging any existing liabilities or obligations and collecting or liquidating its assets, and doing all other acts required to adjust and wind up its business affairs, and may sue and be sued in its corporate name. Any assets remaining after all liabilities and obligations of the cooperative corporation have been satisfied and

discharged shall be refunded pro rata to the patrons, their assignees, personal representatives, heirs, or legatees, who ~~shall~~ have paid for telephone service rendered by the cooperative corporation within ~~a~~ **the** five (5) year period ~~next~~ **immediately** preceding ~~such~~ **the** dissolution. Any assets not ~~so~~ refunded within ~~a~~ **the** two (2) year period after ~~such~~ **the** dissolution is completed shall pass to and become the property of the state. ~~of Indiana.~~

SECTION 52. IC 8-1-17-26 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 26. **(a)** Any foreign corporation organized as a nonprofit corporation for the purpose of making telephone service available to the inhabitants of rural areas may be admitted to do business ~~within this state~~ **in Indiana** and shall have the same powers, restrictions, and liabilities as a cooperative corporation organized under this chapter. Whenever ~~such~~ **a** foreign corporation desires to be admitted to operate in ~~this state,~~ **Indiana,** it shall file with the commission ~~a petition in as many original counterparts as there are counties in Indiana, in which it requests permission to make telephone service available, plus five (5). Said petition shall describe the territory in Indiana in which its operations are to be conducted and pray the commission to grant to it a certificate of public convenience and necessity for such operations. To each such original petition, there~~ **an application for a certificate of territorial authority under IC 8-1-32.5. The appropriate officers of the corporation** shall ~~be attached~~ **attach to the application** a copy of the articles of incorporation of ~~said~~ **the** foreign corporation, ~~with~~ **and** all amendments ~~thereto,~~ **to the articles,** duly authenticated by the proper officer of the state ~~wherein~~ **it in which the corporation** is incorporated. Upon ~~the filing of such petition with the commission,~~ **receipt of the application and the articles of incorporation,** the commission shall ~~set the said petition for public hearing, and shall give notice of the time and place of such hearing by publication one (1) time in at least one (1) newspaper printed and published in each of the counties in which the said foreign corporation proposes to carry on its operations, which publication shall be had at least ten (10) days prior to the date set for such hearing, the cost of such publications to be paid by the petitioners at the time of filing said petition. Also~~ **conduct the review required under IC 8-1-32.5-8. The commission shall give** written notice of ~~the time and place of such hearing shall be mailed~~ **the filing of the application** to each ~~telephone company~~ **facilities based local exchange carrier** operating in contiguous territory in the manner provided in section 5 of this chapter. ~~Any interested person may appear at such hearing, either in person or by attorney, and support or oppose~~

~~the prayer of said petition. The commission shall enter a finding that the convenience and necessity of the public proposed to be served in the Indiana territory in which the operations of the foreign corporation are proposed to be conducted either will or will not be served by such operations. If said finding be in the negative, the commission shall enter an order denying the petition. If such finding be in the affirmative,~~

(b) If the commission, after conducting the review required by IC 8-1-32.5-8 and any hearing allowed under IC 8-1-32.5-9, determines that the foreign corporation meets the requirements for the issuance of a certificate of territorial authority under IC 8-1-32.5, the commission shall enter an order granting a certificate of ~~public convenience and necessity~~ **territorial authority under IC 8-1-32.5** for the proposed operations of ~~said~~ **the** foreign corporation in Indiana and shall attach a copy of ~~said~~ **the** order, duly certified by the secretary of the commission, to each ~~of the originals of said petition, filed as aforesaid, except two (2),~~ **original application filed with the commission** and deliver the ~~same~~ **applications and orders** to the petitioner.

(c) If the commission, after conducting the review required by IC 8-1-32.5-8 and any hearing allowed under IC 8-1-32.5-9, determines that the foreign corporation does not meet the requirements for the issuance of a certificate of territorial authority under IC 8-1-32.5, the commission shall:

(1) request the foreign corporation to provide additional information; or

(2) notify the foreign corporation of the foreign corporation's right to:

(A) appeal the commission's determination under IC 8-1-3; or

(B) file another application at a later date, without prejudice;

under IC 8-1-32.5-8.

(d) If the commission issues a certificate of territorial authority under subsection (b), the foreign corporation shall ~~then~~ present to the secretary of state ~~of Indiana~~ all ~~such~~ sets of authenticated ~~copy~~ **copies** of **its** articles **of incorporation, the** original ~~petitions,~~ **applications under IC 8-1-32.5,** and **the** order of the commission **under subsection (b),** together with ~~such~~ **any** application for admission to do business in ~~this state, if any, as~~ **Indiana that** the secretary of state may require, and **shall** tender to the ~~said~~ secretary of state six dollars and fifty cents ($6.50) to cover ~~his~~ **the secretary of state's** fees ~~for filing, certificate~~

~~and seal.~~ **under this subsection.** If the secretary of state ~~shall approve~~ **approves** the ~~same, he~~ **documents submitted, the secretary of state** shall endorse ~~his~~ **the secretary of state's** approval upon each of the ~~aforesaid sets of~~ documents, file one (1) ~~thereof~~ **copy** in ~~his~~ **the secretary of state's** office, return the remaining ~~ones~~ **copies** to the foreign corporation, and issue to ~~it his~~ **the foreign corporation a** certificate of admission to do business in ~~this state. Thereupon, and~~ **Indiana.** Before the foreign corporation ~~shall~~ **may** do any business in ~~this state,~~ **Indiana,** it shall file in the office of the recorder of each county in Indiana in which it ~~is to~~ **will** make telephone service available one (1) ~~of said sets~~ **set** of **the** documents bearing the approval of the secretary of state ~~endorsed thereon.~~ **under this subsection.**

SECTION 53. IC 8-1-29.5 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]:

Chapter 29.5. Enforcement Remedies for Prohibited Actions by Telecommunications Service Providers and Video Service Providers

Sec. 1. This chapter applies to a provider and a certificate holder.

Sec. 2. Except as otherwise provided, the definitions in IC 8-1-2.6 apply throughout this chapter.

Sec. 3. As used in this chapter, "certificate holder" refers to a person holding a certificate of franchise authority issued under IC 8-1-34-17.

Sec. 4. As used in this chapter, "commission" refers to the Indiana utility regulatory commission created by IC 8-1-1-2.

Sec. 5. As used in this chapter, "customer", with respect to a provider, refers to either of the following:

(1) A residential customer.

(2) A business customer.

Sec. 6. (a) If:

(1) ten (10) or more customers of a provider or a certificate holder;

(2) the utility consumer counselor; or

(3) any class satisfying the standing requirements of IC 8-1-2-54;

files a verified complaint with the commission alleging that a service over which the commission has jurisdiction that is provided by a provider or a certificate holder is unsafe, unjustly discriminatory, or inadequate, or that any service cannot be obtained, the commission may investigate the complaint as the

commission considers appropriate. The commission shall conduct an investigation under this section on an expedited basis.

(b) If, after notice and an opportunity for hearing, the commission determines from an investigation conducted under subsection (a) that a service over which the commission has jurisdiction that is provided by a provider or a certificate holder is unsafe, unjustly discriminatory, or inadequate, or that any service cannot be obtained, the commission may do any of the following:

(1) Issue an order directing the provider or the certificate holder to cease and desist from any action resulting in unsafe, unjustly discriminatory, or inadequate service.

(2) Mandate corrective action.

(3) Revoke or modify the terms of:

(A) an indeterminate permit;

(B) a certificate of territorial authority;

(C) a certificate of franchise authority issued under IC 8-1-34; or

(D) another license or authorization;

issued to the provider or the certificate holder by the commission.

(4) Impose a civil penalty of not more than ten thousand dollars ($10,000) per offense, if the offense involves any of the following:

(A) A willful disregard, as evidenced by a continuing pattern of conduct, by the provider or the certificate holder of its obligation to remedy the offense after the provider or the certificate holder becomes aware of the offense.

(B) Repeated errors in bills issued to one (1) or more customer classes, if the errors:

(i) represent intentional misconduct or an act of fraud by the provider or the certificate holder or by any officer, accountant, or agent of the provider or the certificate holder; or

(ii) demonstrate, by a continuing pattern of conduct, a willful disregard by the provider or the certificate holder of its obligation to remedy the errors after the provider or the certificate holder becomes aware of the errors.

Subject to section 7(a)(1) of this chapter, for purposes of this subdivision, a single act, omission, occurrence, or event that results in multiple complaints being filed under subsection (a)

constitutes a single offense and is not subject to more than one (1) civil penalty. The commission may not consider each day that a particular act, omission, occurrence, or event continues to be a separate offense.

(c) A matter resolved through voluntary mediation is not subject to any of the remedies allowed under subsection (b).

(d) A provider or a certificate holder may not be subject to both:

(1) a civil penalty or order of the commission under this section; and

(2) a penalty or remedy agreed to in a commission approved settlement agreement;

for the same offense. If the commission has approved a settlement agreement under IC 8-1-2.6 that includes penalties or remedies for noncompliance with specific provisions of the settlement agreement, the penalties or remedies provided in this section do not apply to those instances of noncompliance during the life of the settlement agreement.

(e) The attorney general may bring an action in the name of the state to enforce any action taken by the commission under subsection (b), including the collection of an unpaid civil penalty imposed by the commission.

(f) The following are subject to appeal by a provider under IC 8-1-3:

(1) A determination by the commission under this section that a service is unsafe, unjustly discriminatory, or inadequate, or that a service cannot be obtained.

(2) The appropriateness of any action taken by the commission under subsection (b)(1) through (b)(3).

(3) The appropriateness of:

(A) the imposition of a civil penalty by the commission under subsection (b)(4); or

(B) the amount of the penalty imposed.

Upon the motion of a provider or a certificate holder, the commission shall stay the effect or enforceability of an order or penalty under this section pending an appeal, subject to the provider or the certificate holder posting a bond that complies with Rule 18 of the Indiana Rules of Appellate Procedure.

Sec. 7. (a) In imposing a civil penalty under section 6(b)(4) of this chapter, the commission may consider the following factors:

(1) The duration and gravity of the offense, including the number of customers affected.

(2) Economic benefits accrued by the provider or certificate holder as a result of the offense.

(3) The amount of a civil penalty that will deter future offenses by the provider or certificate holder.

(4) The market share of the provider or certificate holder in the affected service areas.

(5) Good faith of the provider or certificate holder in attempting to remedy the offense after receiving notification of the offense.

(b) If the commission waives a civil penalty for any offense described in section 6(b)(4) of this chapter, the commission must make a written finding as to why it is waiving the civil penalty. The commission may waive a civil penalty under section 6(b)(4) of this chapter if the commission finds that the offense is the result of any of the following:

(1) Technological infeasibility.

(2) An act of God.

(3) A defect in, or prohibited use of, customer provided equipment.

(4) A negligent act of a customer.

(5) An emergency situation.

(6) Unavoidable casualty.

(c) The secretary of the commission shall direct a civil penalty imposed and collected under section 6(b)(4) of this chapter as follows:

(1) A civil penalty imposed for an offense that directly affects retail customers must be refunded directly to the customers of the provider or certificate holder in the form of credits on customer bills.

(2) A civil penalty imposed for an offense not described in subdivision (1) must be deposited into an account designated by the Indiana finance authority for use by the authority in making loans or grants to broadband developers and operators under the Indiana broadband development program established by IC 8-1-33-15.

SECTION 54. IC 8-1-32.4 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]:

Chapter 32.4. Telecommunications Providers of Last Resort

Sec. 1. Except as otherwise provided, the definitions in IC 8-1-2.6 apply throughout this chapter.

Sec. 2. As used in this chapter, "approved alternative

technology" refers to any technology that:

(1) offers service and functionality comparable to that provided through an exiting provider's facilities, as determined by the commission;

(2) may include a technology that does not require the use of any public right-of-way; and

(3) is approved by the commission for deployment in a particular service area.

Sec. 3. As used in this chapter, "basic telecommunications service" has the meaning set forth in IC 8-1-2.6-0.1.

Sec. 4. As used in this chapter, "exiting provider" means a provider that:

(1) holds a certificate of territorial authority issued by the commission;

(2) is the predominant local exchange carrier in a defined geographic area and provides telecommunications service using the provider's own facilities; and

(3) ceases operation in all or part of the service area covered by the certificate of territorial authority.

Sec. 5. As used in this chapter, "facilities based local exchange carrier" means a local exchange carrier that provides local exchange service:

(1) exclusively over facilities owned or leased by the carrier; or

(2) predominantly over facilities owned or leased by the carrier, in combination with the resale of the telecommunications service (as defined in 47 U.S.C. 153(46)) of another carrier.

Sec. 6. As used in this chapter, "incumbent local exchange carrier" has the meaning set forth in 47 U.S.C. 251(h).

Sec. 7. As used in this chapter, "local exchange carrier" has the meaning set forth in 47 U.S.C. 153(26).

Sec. 8. As used in this chapter, "local exchange service" means the provision of telephone exchange service (as defined in 47 U.S.C. 153(47)) or exchange access (as defined in 47 U.S.C. 153(16)).

Sec. 9. As used in this chapter, "provider of last resort" means a provider that:

(1) holds a certificate of territorial authority issued by the commission; and

(2) is required to offer local exchange service throughout a defined geographic area.

Sec. 10. As used in this chapter, "successor provider" means a

provider that:

(1) holds a certificate of territorial authority issued by the commission; and

(2) is, or is designated to become, the provider of last resort for a defined geographic area previously served by an exiting provider.

Sec. 11. Except as provided in:

(1) IC 8-1-32.6-8;

(2) section 13 of this chapter; or

(3) section 16 of this chapter;

an incumbent local exchange carrier has the obligations of the provider of last resort. An incumbent local exchange carrier may meet the carrier's obligations under this section using any available technology.

Sec. 12. (a) This section applies to a provider that holds a certificate of territorial authority to provide local exchange service in Indiana. If a provider:

(1) decides to cease serving all or part of the provider's defined service area; or

(2) plans to file for bankruptcy;

the provider shall provide at least sixty (60) days advance notice to the commission and each affected customer and wholesale provider.

(b) A notice described in subsection (a) must:

(1) be submitted in the form and manner prescribed by the commission; and

(2) include at least one (1) toll free customer service telephone number maintained by the provider to facilitate the continuation of service and the transition of customers to other providers.

(c) The exiting provider is liable for all charges owed to other providers and is responsible for any provider change charges.

Sec. 13. (a) If the holder of a certificate of territorial authority to provide local exchange service installs facilities to provide telecommunications service, including local exchange service, in a defined geographic area and:

(1) the holder is not the designated provider of last resort for the area; and

(2) the designated provider of last resort for the area has not installed facilities to serve customers in the area;

the designated provider of last resort may petition the commission for an order relieving the designated provider of its obligations as

the provider of last resort in the area.

(b) The commission shall relieve the petitioning provider from its obligations as the provider of last resort for the area described in subsection (a) and shall designate the holder making the installation under subsection (a) as the provider of last resort for the area if the commission determines that:

(1) the petitioning provider does not have facilities in place to provide local exchange service to all customers in the area; and

(2) the holder making the installation under subsection (a) has installed facilities adequate to provide local exchange service throughout the area.

The commission shall make the determinations required by this subsection not later than sixty (60) days after the date the petition is filed with the commission under subsection (a).

Sec. 14. (a) Except as provided in IC 8-1-32.6-8 or section 16 of this chapter, if:

(1) the commission receives notice of an exiting provider's decision to cease operation in all or part of the service area covered by the provider's certificate of territorial authority; and

(2) there is not another provider that:

(A) holds a certificate of territorial authority in the area; and

(B) has facilities sufficient to provide basic telecommunications service in the area;

the commission shall conduct a formal proceeding to determine the successor provider for the area.

(b) After determining the successor provider for the affected area under subsection (a), the commission shall, if applicable, allow the following with respect to the successor provider:

(1) A reasonable time, determined by the commission and in accordance with industry practices, in which to:

(A) modify, construct, or obtain the facilities; or

(B) deploy an approved alternative technology;

necessary to serve the customers of the exiting provider.

(2) A temporary exemption from any lawful obligation to unbundle the successor provider's network elements. The exemption under this subdivision shall continue for a period determined by the commission to be reasonably necessary to allow the successor provider to:

(A) modify, construct, or obtain the facilities; or

(B) deploy an alternative technology;

that will allow the successor provider to serve the customers of the exiting provider.

(3) A temporary exemption from any lawful obligation to provide telecommunications service for resale within the affected area. The exemption under this subdivision shall continue for a period determined by the commission to be reasonably necessary to allow the successor provider to:

(A) modify, construct, or obtain the facilities; or

(B) deploy an alternative technology;

that will allow the successor provider to serve the customers of the exiting provider.

(c) The successor provider is entitled to obtain funding from a state universal service fund to support the provider's assumption of obligations as the provider of last resort for the area. This section does not prohibit a provider from voluntarily:

(1) serving customers in the affected area; or

(2) purchasing the facilities of the exiting provider.

(d) A customer within the defined geographic area to be served by the successor provider is considered to have applied for basic telecommunications service from the successor provider on the effective date of the commission's designation of the successor provider. Each right, privilege, and obligation applicable to customers of the successor provider applies to a customer transferred to the successor provider under this section. A customer transferred to the successor provider under this section is subject to the successor provider's terms of service as specified in an applicable tariff or contract. This section does not prohibit a customer from seeking, at any time, service from a provider other than the successor provider.

Sec. 15. (a) The commission may, on its own motion or on the petition of an interested party, institute an expedited proceeding under this section if the commission determines that:

(1) a facilities based local exchange carrier has a certificate of territorial authority to provide local exchange service in a defined geographic area;

(2) there is not another provider that:

(A) holds a certificate of territorial authority in the area; and

(B) has facilities sufficient to provide local exchange service in the area; and

(3) the facilities based local exchange carrier has:

(A) ceased providing local exchange service to the customers in the area; or

(B) abandoned the operation of the carrier's facilities in the area that are used to provide local exchange service.

(b) In a proceeding under this section, the commission may declare in accordance with IC 8-1-2-113 that an emergency exists and issue any order necessary to protect the health, safety, and welfare of affected customers and to expedite the restoration or continuation of local exchange service to the affected customers. An order issued under this subsection may:

(1) provide for the temporary operation of the facilities based local exchange carrier's facilities by any provider, including a provider that has not been issued a certificate of territorial authority by the commission;

(2) authorize one (1) or more third parties to enter the premises of any abandoned facilities; or

(3) grant temporary waivers from quality of service requirements for any provider:

(A) providing service under subdivision (1); or

(B) designated as a successor provider by the commission under subsection (c).

(c) Except as provided in IC 8-1-32.6-8 or section 16 of this chapter, the commission may act under section 14 of this chapter to designate a successor provider in any proceeding under this section.

Sec. 16. (a) If a provider, other than the incumbent local exchange carrier, operates under an arrangement by which the provider is the exclusive provider of basic telecommunications service in a particular geographic area, building, or group of residences and businesses, the incumbent local exchange carrier is relieved of any provider of last resort obligations that the incumbent local exchange carrier would ordinarily have with respect to the particular geographic area, building, or group of residences and buildings.

(b) If:

(1) a provider with an exclusive service arrangement described in subsection (a) decides to cease operations in all or part of the particular geographic area, building, or group of residences and buildings that the provider serves under the arrangement; and

(2) the incumbent local exchange carrier:

(A) has insufficient facilities to serve the affected

customers of the exiting provider; and

(B) elects to purchase the facilities of the exiting provider;

the incumbent local exchange carrier has twelve (12) months to make any modifications necessary to the purchased facilities to allow the incumbent local exchange carrier to serve the affected customers of the exiting provider. The incumbent local exchange carrier may apply to the commission for an extension of the period allowed under this subsection, and the commission shall grant the extension upon good cause shown by the incumbent local exchange carrier.

(c) If:

(1) a provider with an exclusive service arrangement described in subsection (a) decides to cease operations in all or part of the particular geographic area, building, or group of residences and buildings that the provider serves under the arrangement; and

(2) the incumbent local exchange carrier:

(A) has insufficient facilities to serve the affected customers of the exiting provider; and

(B) elects not to purchase the facilities of the exiting provider;

the incumbent local exchange carrier has twelve (12) months to deploy an approved alternative technology necessary to allow the incumbent local exchange carrier to serve the affected customers of the exiting provider. The incumbent local exchange carrier may apply to the commission for an extension of the period allowed under this subsection, and the commission shall grant the extension upon good cause shown by the incumbent local exchange carrier.

SECTION 55. IC 8-1-32.5 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]:

Chapter 32.5. Certificates of Territorial Authority for Communications Service Providers

Sec. 1. This chapter applies to a communications service provider that seeks to offer communications service to Indiana customers after June 30, 2009.

Sec. 2. As used in this chapter, "commission" refers to the Indiana utility regulatory commission created by IC 8-1-1-2.

Sec. 3. (a) As used in this chapter, "communications service" refers to any of the following:

(1) Telecommunications service (as defined in 47 U.S.C. 153(46)).

(2) Information service (as defined in 47 U.S.C. 153(20)).

(b) The term includes:

(1) video service (as defined in IC 8-1-34-14);

(2) broadband service;

(3) advanced services (as defined in 47 CFR 51.5); and

(4) Internet Protocol enabled services;

however classified by the Federal Communications Commission.

Sec. 4. As used in this chapter, "communications service provider" means a person or an entity that offers communications service to customers in Indiana, without regard to the technology or medium used by the person or entity to provide the communications service. The term includes a provider of commercial mobile service (as defined in 47 U.S.C. 332).

Sec. 5. As used in this chapter, "facilities based local exchange carrier" means a local exchange carrier (as defined in 47 U.S.C. 153(26)) that provides telephone exchange service (as defined in 47 U.S.C. 153(47)) or exchange access (as defined in 47 U.S.C. 153(16)):

(1) exclusively over facilities owned or leased by the carrier; or

(2) predominantly over facilities owned or leased by the carrier, in combination with the resale of the telecommunications service (as defined in 47 U.S.C. 153(46)) of another carrier.

Sec. 6. (a) Except as provided in subsection (c), before a communications service provider may offer communications service to customers in Indiana, the communications service provider must apply to the commission for a certificate of territorial authority. A communications service provider that seeks a certificate under this chapter shall submit an application on a form prescribed by the commission. The form prescribed by the commission must require the communications service provider to report the following information:

(1) The provider's legal name and any name under which the provider does or will do business in Indiana, as authorized by the secretary of state.

(2) The provider's address and telephone number, along with contact information for the person responsible for ongoing communications with the commission.

(3) The legal name, address, and telephone number of the provider's parent company, if any.

(4) A description of each service area in Indiana in which the

provider proposes to offer communications service.

(5) For each service area identified under subdivision (4), a description of each type of communications service that the provider proposes to offer in the service area.

(6) For each communications service identified under subdivision (5), whether the communications service will be offered to residential customers or business customers, or both.

(7) The expected date of deployment for each communications service identified under subdivision (5) in each service area identified in subdivision (4).

(8) A list of other states in which the provider offers communications service, including the type of communications service offered.

(9) Any other information the commission considers necessary to:

(A) monitor the type and availability of communications service provided to Indiana customers; and

(B) prepare the commission's annual report to the regulatory flexibility committee under IC 8-1-2.6-4.

The commission may charge a fee for filing an application under this section. Any fee charged by the commission under this subsection may not exceed the commission's actual costs to process and review the application under section 8 of this chapter.

(b) A communications service provider shall also submit, along with the application required by subsection (a), the following documents:

(1) A certification from the secretary of state authorizing the provider to do business in Indiana.

(2) Information demonstrating the provider's financial, managerial, and technical ability to provide each communications service identified in the provider's application under subsection (a)(5) in each service area identified under subsection (a)(4).

(3) A statement, signed under penalty of perjury by an officer or another person authorized to bind the provider, that affirms the following:

(A) That the provider has filed or will timely file with the Federal Communications Commission all forms required by the Federal Communications Commission before offering communications service in Indiana.

(B) That the provider agrees to comply with any customer

notification requirements imposed by the commission under section 11(c) of this chapter.

(C) That the provider agrees to update the information provided in the application submitted under subsection (a) on a regular basis, as may be required by the commission under section 12 of this chapter.

(D) That the provider agrees to notify the commission when the provider commences offering communications service in each service area identified in the provider's application under subsection (a)(4).

(E) That the provider agrees to pay any lawful rate or charge for switched and special access services, as required under any:

(i) applicable interconnection agreement; or

(ii) lawful tariff or order approved or issued by a regulatory body having jurisdiction.

(F) That the provider agrees to report, at the times required by the commission, any information required by the commission under IC 8-1-2.6-13(d)(9).

(c) If:

(1) a communications service provider has been issued a:

(A) certificate of territorial authority; or

(B) certificate of public convenience and necessity;

by the commission before July 1, 2009; and

(2) the certificate described in subdivision (1) is in effect on July 1, 2009;

the communications service provider is not required to submit an application under this section for as long as the certificate described in subdivision (1) remains in effect. For purposes of this subsection, if a corporation organized under IC 8-1-13 (or a corporation organized under IC 23-17-1 that is an electric cooperative and that has at least one (1) member that is a corporation organized under IC 8-1-13) holds a certificate of public convenience and necessity issued by the commission before, on, or after July 1, 2009, that certificate may serve as the certificate required under this chapter with respect to any communications service offered by the corporation, subject to the commission's right to require the corporation to provide any information that an applicant is otherwise required to submit under subsection (a) or that a holder is required to report under IC 8-1-2.6-13(d)(9).

(d) This section does not empower the commission to require an

applicant for a certificate under this chapter to disclose confidential and proprietary business plans and other confidential information without adequate protection of the information. The commission shall exercise all necessary caution to avoid disclosure of confidential information supplied under this subsection.

Sec. 7. A communications service provider shall submit duplicate copies of the application and documents required by section 6 of this chapter to the commission. The commission shall prescribe the number of copies to be submitted by a communications service provider under this section.

Sec. 8. Not later than thirty (30) days after receiving the application and documents required by section 6 of this chapter, the commission shall review the application and documents for accuracy and completeness. If the commission determines that the application and documents are accurate, complete, and properly verified, the commission shall issue a certificate of territorial authority recognizing the communications service provider's authority to provide each communications service identified in the application. If the commission determines that the application and documents are inaccurate or incomplete, or are not properly verified, the commission shall return the application and documents to the provider with a brief statement of any additional information required. Not later than thirty (30) days after receipt of the request for additional information, the provider may:

(1) provide the information requested;

(2) appeal the decision of the commission under IC 8-1-3; or

(3) decide to file another application at a later date, without prejudice.

Sec. 9. (a) A hearing is not required in connection with the issuance of a certificate under this chapter. However, the commission shall conduct a hearing, subject to the requirements for hearings under IC 8-1-2 for public utilities, upon the request of any of the following:

(1) The communications service provider submitting the application.

(2) Any facilities based local exchange carrier offering service in a service area identified in the provider's application under section 6(a)(4) of this chapter.

(3) The office of utility consumer counselor created by IC 8-1-1.1-2.

(4) The commission, on its own motion.

(b) A hearing conducted under this section shall be limited to

consideration of one (1) or more of the following issues:

(1) Whether the application and documents submitted under section 6 of this chapter are accurate, complete, and properly verified.

(2) The communications service provider's financial, managerial, and technical ability to provide the communications service for which it seeks a certificate under this chapter.

(c) The commission may not require a:

(1) communications service provider; or

(2) facilities based local exchange carrier offering service in a service area identified in the provider's application under section 6(a)(4) of this chapter;

to be represented by counsel at a hearing under this section.

Sec. 10. Subject to any notice requirements adopted by the commission under section 12 of this chapter, a certificate issued under this chapter may be:

(1) sold, assigned, leased, or transferred by the holder to any communications service provider to which a certificate of territorial authority may be lawfully issued under this chapter; or

(2) included in the property and rights encumbered under any indenture of mortgage or deed of trust of the holder.

Sec. 11. (a) The commission may not require a communications service provider to file a tariff in connection with, or as a condition of receiving, a certificate of territorial authority under this chapter.

(b) This subsection does not apply to a provider of commercial mobile service (as defined in 47 U.S.C. 332). The commission may require, in connection with the issuance of a certificate under this chapter, the communications service provider to provide advance notice to the provider's Indiana customers if the provider will do any of the following:

(1) Increase the rates and charges for any communications service that the provider offers in any of the provider's service areas in Indiana.

(2) Offer new communications service in any of the provider's service areas in Indiana.

(3) Cease to offer any communications service that the provider offers in any of the provider's service areas in Indiana.

The commission shall prescribe any customer notification

requirements under this subsection in a rule of general application adopted under IC 4-22-2.

Sec. 12. In connection with, or as a condition of receiving, a certificate of territorial authority under this chapter, the commission may require a communications service provider to notify the commission, after the issuance of a certificate, of any of the following changes involving the provider or the certificate issued:

(1) Any transaction involving a change in the ownership, operation, control, or corporate organization of the provider, including a merger, acquisition, or reorganization.

(2) A change in the provider's legal name or the adoption of, or change to, an assumed business name. The provider shall submit to the commission a certified copy of the:

(A) amended certificate of authority; or

(B) certificate of assumed business name;

issued by the secretary of state to reflect the change.

(3) A change in the provider's principal business address or in the name of the person authorized to receive notice on behalf of the provider.

(4) Any sale, assignment, lease, or transfer of the certificate to another communications service provider, as allowed by section 10 of this chapter. The provider shall identify the other communications service provider to which the sale, assignment, lease, or transfer is made.

(5) The relinquishment of any certificate issued under this chapter. The provider shall identify:

(A) any other certificate of territorial authority issued under this chapter that will be retained by the provider;

(B) the number of Indiana customers in the service area covered by the certificate being relinquished; and

(C) the method by which the provider's customers were or will be notified of the relinquishment, if required in a rule adopted by the commission under section 11(c) of this chapter.

(6) This subdivision does not apply to a provider of commercial mobile service (as defined in 47 U.S.C. 332). A change in the communications service provided in one (1) or more of service areas identified in the provider's application under section 6(a)(4) of this chapter. However, if new services will be provided in one (1) or more of the service areas, the commission may require the provider to submit a new

application under section 6 of this chapter with respect to those services.

(7) A change in one (1) or more of the service areas identified in the provider's application under section 6(a)(4) of this chapter that would increase or decrease the territory within the service area.

The commission shall prescribe the time in which a provider must report changes under this section. The commission may prescribe a form for the reporting of changes under this section.

Sec. 13. The commission shall maintain a record of all certificates of territorial authority issued under this chapter. The record must include all application forms, notices of change under section 12 of this chapter, and other documents filed with the commission under this chapter. The record must be made available:

(1) for public inspection and copying in the office of the commission during regular business hours under IC 5-14-3; and

(2) electronically through the computer gateway administered by the office of technology established by IC 4-13.1-2-1;

to the extent the information in the record is not exempt from public disclosure under IC 5-14-3-4(a).

Sec. 14. A communications service provider that holds a certificate issued under this chapter is exempt from local franchises and related fees to the same extent as a communications service provider that holds a certificate of territorial authority or an indeterminate permit issued under IC 8-1-2 before July 1, 2009.

Sec. 15. The commission may adopt rules under IC 4-22-2 to implement this chapter.

SECTION 56. IC 8-1-32.6 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]:

Chapter 32.6. Access to Real Property by Communications Service Providers

Sec. 1. As used in this chapter, "commission" refers to the Indiana utility regulatory commission created by IC 8-1-1-2.

Sec. 2. (a) As used in this chapter, "communications service" refers to any of the following:

(1) Telecommunications service (as defined in 47 U.S.C. 153(46)).

(2) Information service (as defined in 47 U.S.C. 153(20)).

(b) The term includes:

(1) video service (as defined in IC 8-1-34-14);

(2) broadband service;

(3) advanced services (as defined in 47 CFR 51.5); and

(4) Internet Protocol enabled services;

however classified by the Federal Communications Commission.

Sec. 3. As used in this chapter, "communications service provider" means a person or an entity, or an affiliate (as defined in IC 8-1-34-1) of a person or an entity, that offers communications service to customers in Indiana, without regard to the technology or medium used by the person or entity to provide the communications service. The term includes a provider of commercial mobile service (as defined in 47 U.S.C. 332).

Sec. 4. As used in this chapter, "multitenant real estate" means any:

(1) geographic area;

(2) building; or

(3) group of buildings;

containing more than one (1) unit for business purposes. The term includes office buildings and office parks. The term does not include apartment buildings, condominiums, or subdivisions.

Sec. 5. As used in this chapter, "person" means an individual, a corporation, a limited liability company, a partnership, an unincorporated association, or a governmental entity.

Sec. 6. As used in this chapter, "provider of last resort" has the meaning set forth in IC 8-1-32.4-9.

Sec. 7. (a) After March 27, 2006, a communications service provider shall not enter into any contract, agreement, or other arrangement that does any of the following:

(1) Requires any person to restrict or limit:

(A) the ability of another communications service provider to obtain easements or rights-of-way for the installation of facilities or equipment used to provide communications service to Indiana customers; or

(B) access to real property by another communications service provider.

(2) Offers or grants incentives or rewards to an owner of real property if the incentives or rewards are contingent upon the property owner's agreement to restrict or limit:

(A) the ability of another communications service provider to obtain easements or rights-of-way for the installation of facilities or equipment used to provide communications service on the property; or

(B) access to the owner's real property by another communications service provider.

A contract, an agreement, or any other arrangement that violates this section is void if the contract, agreement, or arrangement is entered into after March 27, 2006. However, a contract, an agreement, or any other arrangement that otherwise violates this section remains in effect until such time as it would normally terminate or expire if the contract, agreement, or arrangement is entered into before March 28, 2006.

(b) This section does not prohibit a communications service provider and a subscriber from entering into any lawful contract, agreement, or other arrangement concerning the communications service offered by the communications service provider to the subscriber.

(c) Upon:

(1) a complaint filed by:

(A) another communications service provider;

(B) a subscriber or potential subscriber of communications service;

(C) the utility consumer counselor; or

(D) any class satisfying the standing requirements of IC 8-1-2-54; or

(2) the commission's own motion;

the commission may investigate whether a communications service provider has violated this section. If, after notice and an opportunity for hearing, the commission determines that the communications service provider has violated this section, the commission may issue an order imposing a civil penalty of not more than five hundred dollars ($500) for each violation. For purposes of this subsection, each day that a contract, an agreement, or an arrangement prohibited by this section remains in effect constitutes a separate violation.

(d) The attorney general may bring an action in the name of the state to enforce an order of the commission under subsection (c), including the collection of an unpaid civil penalty imposed by the commission.

(e) Civil penalties collected under this section shall be deposited in the state general fund.

(f) A determination by the commission under this section is subject to appeal under IC 8-1-3.

Sec. 8. (a) Notwithstanding IC 8-1-32.4-14, the commission may not require a communications service provider, including a

provider of last resort, to provide any communications service to the occupants of multitenant real estate if the owner, operator, or developer of the multitenant real estate does any of the following to the benefit of another communications service provider:

(1) Permits only one (1) communications service provider to install the provider's facilities or equipment during the construction or development phase of the multitenant real estate.

(2) Accepts or agrees to accept incentives or rewards that:

(A) are offered by a communications service provider to the owner, operator, developer, or occupants of the multitenant real estate; and

(B) are contingent upon the provision of communications service by that provider to the occupants of the multitenant real estate, to the exclusion of any services provided by other communications service providers.

(3) Collects from the occupants of the multitenant real estate any charges for the provision of communications service to the occupants, including charges collected through rent, fees, or dues.

(4) Enters into an agreement with a communications service provider that is prohibited by section 7 of this chapter.

(b) This subsection applies to a communications service provider that is relieved under subsection (a) of an obligation to provide communications service to the occupants of multitenant real estate. This section does not prohibit the communications service provider from voluntarily offering service to the occupants of the multitenant real estate. However, the commission shall not exercise jurisdiction over the terms, conditions, rates, or availability of any communications service voluntarily offered by a communications service provider under this subsection.

Sec. 9. (a) Except as provided in subsection (b), the owner, operator, or developer of multitenant real estate located in a service area in which one (1) or more communications service providers are authorized to provide communications service may not do any of the following:

(1) Prevent a communications service provider from installing on the premises communications service equipment that an occupant requests.

(2) Interfere with a communications service provider's installation on the premises of communications service equipment that an occupant requests.

(3) Discriminate against a communications service provider or impose unduly burdensome conditions on the terms, conditions, and compensation for a communications service provider's installation of communications service equipment on the premises.

(4) Demand or accept an unreasonable payment from:

(A) an occupant; or

(B) a communications service provider;

in exchange for allowing the communications service provider access to the premises.

(5) Discriminate against or in favor of an occupant in any manner, including charging higher or lower rental charges to the occupant, because of the communications service provider from which the occupant receives communications service.

(b) This section does not prohibit the owner, operator, or developer of multitenant real estate from doing any of the following:

(1) Imposing a condition on a communications service provider that is reasonably necessary to protect:

(A) the safety, security, appearance, or condition of the property; or

(B) the safety and convenience of other persons.

(2) Imposing a reasonable limitation on the hours during which a communications service provider may have access to the premises to install communications service equipment.

(3) Imposing a reasonable limitation on the number of communications service providers that have access to the premises, if the owner, operator, or developer can demonstrate a space constraint that requires the limitation.

(4) Requiring a communications service provider to agree to indemnify the owner, operator, or developer for damage caused by installing, operating, or removing communications service equipment on or from the premises.

(5) Requiring an occupant or a communications service provider to bear the entire cost of installing, operating, or removing communications service equipment.

(6) Requiring a communications service provider to pay compensation for access to or use of the premises, as long as the compensation is:

(A) reasonable; and

(B) nondiscriminatory;

among communications service providers.

(c) For purposes of this subsection, an "affected person" includes the following:

(1) An occupant that is a current or potential subscriber of communications service on the premises of multitenant real estate.

(2) A unit in which multitenant real estate is located, acting on behalf of:

(A) a person described in subdivision (1); or

(B) other similarly situated persons.

(3) A communications service provider.

An affected person that alleges a violation of this section by the owner, operator, or developer of multitenant real estate may seek equitable or compensatory relief in a court having jurisdiction. The party prevailing in any action filed under this section is entitled to recover the costs of the action, including reasonable attorney's fees as determined by the court.

Sec. 10. The commission may adopt rules under IC 4-22-2 to implement this chapter.

SECTION 57. IC 8-1-33-13, AS ADDED BY P.L.235-2005, SECTION 105, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 13. As used in this chapter, "underserved area" means an area within Indiana that the authority determines ~~does not have a person that:~~

~~(1) provides broadband service in the area at the time of the authority's inquiry under section 14 of this chapter; or~~

~~(2) intends to provide broadband service not later than three (3) months after the date of the authority's inquiry under section 14 of this chapter.~~

is not being adequately served with broadband service.

SECTION 58. IC 8-1-34 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]:

Chapter 34. Video Service Franchises

Sec. 1. As used in this chapter, "affiliate" has the meaning set forth in IC 23-1-43-1. The term includes a parent company or a subsidiary.

Sec. 2. As used in this chapter, "certificate" refers to a certificate of franchise authority issued by the commission under section 17 of this chapter.

Sec. 3. As used in this chapter, "commission" refers to the Indiana utility regulatory commission created by IC 8-1-1-2.

Sec. 4. As used in this chapter, "franchise" means an initial

authorization, or a renewal of an authorization, that:

(1) is issued by the commission under this chapter after June 30, 2006; and

(2) authorizes the construction or operation of a video service system in a designated service area in Indiana.

Sec. 5. As used in this chapter, "gross revenue" means all consideration of any kind or nature, including cash, credits, property, and in kind contributions:

(1) received by a holder from the operation of a video service system in a particular unit in Indiana; and

(2) calculated by the holder under section 23 of this chapter.

Sec. 6. As used in this chapter, "holder" refers to a person that holds a certificate issued by the commission under this chapter after June 30, 2006.

Sec. 7. As used in this chapter, "incumbent provider" means the provider serving the largest number of video service subscribers in a particular local franchise service area on July 1, 2006.

Sec. 8. As used in this chapter, "local franchise" means an initial authorization, or a renewal of an authorization, that:

(1) is issued by a unit before July 1, 2006; and

(2) authorizes the construction or operation of a video service system in a designated service area in the unit.

Sec. 9. As used in this chapter, "other programming service" refers to information that a provider makes available to all subscribers generally.

Sec. 10. As used in this chapter, "person" means an individual, a corporation, a partnership, a limited liability company, an association, or another entity organized under the laws of any state.

Sec. 11. As used in this chapter, "provider" refers to a multichannel video programming distributor (as defined in 47 U.S.C. 522(13)).

Sec. 12. As used in this chapter, "unit" has the meaning set forth in IC 36-1-2-23.

Sec. 13. As used in this chapter, "video programming" has the meaning set forth in 47 U.S.C. 522(20).

Sec. 14. (a) As used in this chapter, "video service" means:

(1) the transmission to subscribers of video programming and other programming service:

(A) through facilities located at least in part in a public right-of-way; and

(B) without regard to the technology used to deliver the

video programming or other programming service; and

(2) any subscriber interaction required for the selection or use of the video programming or other programming service.

(b) The term does not include commercial mobile service (as defined in 47 U.S.C. 332).

Sec. 15. (a) As used in this chapter, "video service system" means a system, consisting of a set of transmission paths and associated signal generation, reception, and control equipment, that is designed to provide video service directly to subscribers within a community. The term includes the:

(1) optical spectrum wavelengths;

(2) bandwidth; or

(3) other current or future technological capacity;

used to provide the video service.

(b) The term does not include a system that transmits video service to subscribers without using any public right-of-way.

Sec. 16. (a) Except as provided in section 21 of this chapter, after June 30, 2006:

(1) the commission is the sole franchising authority (as defined in 47 U.S.C. 522(10)) for the provision of video service in Indiana; and

(2) a unit may not:

(A) require a provider to obtain a separate franchise; or

(B) impose any fee, gross receipt tax, licensing requirement, rate regulation, or build-out requirement on a provider;

except as authorized by this chapter.

(b) Except as provided in section 21 of this chapter, a person who seeks to provide video service in Indiana after June 30, 2006, shall file with the commission an application for a franchise. The application shall be made on a form prescribed by the commission and must include the following:

(1) A sworn affidavit, signed by an officer or another person authorized to bind the applicant, that affirms the following:

(A) That the applicant has filed or will timely file with the Federal Communications Commission all forms required by the Federal Communications Commission before offering video service in Indiana.

(B) That the applicant agrees to comply with all federal and state statutes, rules, and regulations applicable to the operation of the applicant's video service system.

(C) That the applicant agrees to:

(i) comply with any local ordinance or regulation governing the use of public rights-of-way in the delivery of video service; and

(ii) recognize the police powers of a unit to enforce the ordinance or regulation.

(D) If the applicant will terminate an existing local franchise under section 21 of this chapter, that the applicant agrees to perform any obligations owed to any private person under the terminated franchise until such time as the local franchise would otherwise terminate or expire, as required by section 22 of this chapter.

(2) The applicant's legal name and any name under which the applicant does or will do business in Indiana, as authorized by the secretary of state.

(3) The address and telephone number of the applicant's principal place of business, along with contact information for the person responsible for ongoing communications with the commission.

(4) The names and titles of the applicant's principal officers.

(5) The legal name, address, and telephone number of the applicant's parent company, if any.

(6) A description of each service area in Indiana to be served by the applicant. A service area described under this subdivision may include an unincorporated area in Indiana.

(7) The expected date for the deployment of video service in each of the areas identified in subdivision (6).

(8) A list of other states in which the applicant provides video service.

(9) If the applicant will terminate an existing local franchise under section 21(b) of this chapter, a copy of the written notice sent to the municipality under section 21(c) of this chapter.

(10) Any other information the commission considers necessary to:

(A) monitor the provision of video service to Indiana customers; and

(B) prepare the commission's annual report to the regulatory flexibility committee under IC 8-1-2.6-4.

This subsection does not empower the commission to require an applicant to disclose confidential and proprietary business plans and other confidential information without adequate protection of the information. The commission shall exercise all necessary

caution to avoid disclosure of confidential information supplied under this subsection.

(c) The commission may charge a fee for filing an application under this section. Any fee charged by the commission under this subsection may not exceed the commission's actual costs to process and review the application under section 17 of this chapter.

Sec. 17. (a) Not later than fifteen (15) business days after the commission receives an application under section 16 of this chapter, the commission shall determine whether the application is complete and properly verified. If the commission determines that the application is incomplete or is not properly verified, the commission shall notify the applicant of the deficiency and allow the applicant to resubmit the application after correcting the deficiency. If the commission determines that the application is complete and properly verified, the commission shall issue the applicant a certificate of franchise authority. A certificate issued under this section must contain:

(1) a grant of authority to provide the video service requested in the application;

(2) a grant of authority to use and occupy public rights-of-way in the delivery of the video service, subject to:

(A) state and local laws and regulations governing the use and occupancy of public rights-of-way; and

(B) the police powers of local units to enforce local ordinances and regulations governing the use and occupancy of public rights-of-way; and

(3) a statement that the authority granted under subdivisions (1) and (2) is subject to the holder's lawful provision and operation of the video service.

(b) Except as provided in subsection (c) and section 28 of this chapter, the commission may not require a provider to:

(1) satisfy any build-out requirements;

(2) deploy, or make investments in, any infrastructure, facilities, or equipment; or

(3) pay an application fee, a document fee, a state franchise fee, a service charge, or any fee other than the franchise fee paid to a local unit under section 24 of this chapter;

as a condition of receiving or holding a certificate under this chapter.

(c) This section does not limit the commission's right to enforce any obligation described in subsection (b) that a provider is subject to under the terms of a settlement agreement approved by the

commission before July 29, 2004.

(d) The general assembly, a state agency, or a unit may not adopt a law, rule, ordinance, or regulation governing the use and occupancy of public rights-of-way that:

(1) discriminates against any provider, or is unduly burdensome with respect to any provider, based on the particular facilities or technology used by the provider to deliver video service; or

(2) allows a video service system owned or operated by a unit to use or occupy public rights-of-way on terms or conditions more favorable or less burdensome than those that apply to other providers.

A law, a rule, an ordinance, or a regulation that violates this subsection is void.

Sec. 18. Subject to the notice requirements under section 20 of this chapter, a certificate issued under this chapter may be transferred to any successor in interest of the holder to which the certificate is originally granted.

Sec. 19. A certificate issued under this chapter may be terminated by the holder by submitting notice to the commission under section 20 of this chapter.

Sec. 20. (a) In connection with, or as a condition of receiving, a certificate under this chapter, the commission shall require a holder to notify the commission, after the issuance of a certificate, of any of the following changes involving the holder or the certificate issued:

(1) Any transaction involving a change in the ownership, operation, control, or corporate organization of the holder, including a merger, an acquisition, or a reorganization.

(2) A change in the holder's legal name or the adoption of, or change to, an assumed business name. The holder shall submit to the commission a certified copy of the:

(A) amended certificate of authority; or

(B) certificate of assumed business name;

issued by the secretary of state to reflect the change.

(3) A change in the holder's principal business address or in the name of the person authorized to receive notice on behalf of the holder.

(4) Any transfer of the certificate to a successor in interest of the holder allowed by section 18 of this chapter. The holder shall identify the successor in interest to which the transfer is made.

(5) The termination of any certificate issued under this chapter, as allowed by section 19 of this chapter. The holder shall identify:

(A) any other certificate issued under this chapter that will be retained by the holder;

(B) the number of Indiana customers in the service area covered by the certificate being terminated; and

(C) the method by which the holder's customers were notified of the termination, if required by the commission under subsection (c).

(6) A change in the video programming or other programming service provided in one (1) or more of the services areas identified under section 16(b)(6) of this chapter in the holder's most recent application for a certificate under this chapter.

(7) A change in one (1) or more of the service areas identified under section 16(b)(6) of this chapter that would increase or decrease the territory within the service area. The holder shall describe the new boundaries of the affected service areas after the proposed change is made.

The commission shall prescribe the time in which a holder must report changes under this section. The commission may prescribe a form for the reporting of changes under this section.

(b) In connection with, or as a condition of, receiving a certificate under this chapter, the commission shall require a holder to notify a unit:

(1) in which the holder does not already provide video service under:

(A) a local franchise issued by the unit before July 1, 2006; or

(B) another certificate issued under this chapter after June 30, 2006; and

(2) that is included in the holder's service area under the certificate being issued;

that the holder intends to provide video service in the unit's jurisdiction. The holder shall give the notice required under this subdivision not later than ten (10) days before the holder begins providing video service in the unit's jurisdiction.

(c) In connection with the issuance of a certificate under this chapter, the commission may require a holder to provide advance notice to the holder's Indiana customers if the holder will do any of the following:

(1) Change the rates and charges for video service that the holder offers in any of its service areas in Indiana.

(2) Cease to offer video service, or any specific video programming or other programming service, that the holder offers in any of the holder's service areas in Indiana.

The commission shall prescribe any customer notification requirements under this subsection in a rule of general application adopted under IC 4-22-2.

Sec. 21. (a) For purposes of this section, a provider is considered to be a holder of a local franchise on June 30, 2006, if:

(1) the provider; or

(2) any affiliate or successor entity of the provider;

holds a local franchise to provide video service in a unit on June 30, 2006.

(b) After June 30, 2006, a provider that is the holder of a local franchise on June 30, 2006, regardless of whether the provider is the incumbent provider in the local franchise service area, may elect to:

(1) continue providing video service under the local franchise until the local franchise expires; or

(2) subject to section 22 of this chapter, terminate the local franchise and apply to the commission for a certificate under this chapter.

(c) A provider that elects to terminate a local franchise under subsection (b) must provide written notice of the provider's election to:

(1) the commission; and

(2) the affected unit;

not later than November 1, 2006. The local franchise is terminated on the date the commission issues a certificate to the provider under this chapter.

(d) Not later than ninety (90) days after a local franchise is terminated under subsection (c), the provider that terminated the local franchise shall remit to the affected unit any accrued but unpaid franchise fees due under the local franchise. If the provider has credit remaining from any prepaid franchise fees, the provider may deduct the amount of the credit from any future fees or taxes owed to the affected unit.

Sec. 22. (a) A provider that elects to terminate a local franchise under section 21 of this chapter remains subject to the contractual rights, duties, and obligations incurred by the provider under the terms and conditions of the terminated local franchise that are

owed to any private person, including a subscriber.

(b) The obligations that a provider owes to a private person under subsection (a) include any obligations based on the gross income received by the provider:

(1) after the provider becomes a holder of a certificate under this chapter; and

(2) for video service provided in the service area covered by the terminated local franchise;

if, under the terms of the terminated local franchise, the obligations would have been based on the gross income received by the provider for video service provided in the service area covered by the terminated local franchise.

(c) All liens, security interests, royalties, and other contracts, rights, and interests arising out of the terminated local franchise and owed to a private person, shall:

(1) continue in full force and effect without the need for renewal, extension, or continuance;

(2) be paid or performed by the provider after becoming a holder of a certificate under this chapter; and

(3) apply as though the gross revenue of the provider continued to be generated under the terminated local franchise with respect to any revenue generated in the service area covered by the terminated local franchise.

(d) The commission shall condition the issuance or renewal of a certificate under this chapter on a provider's payment and performance of the rights, duties, and obligations described in this section until the time the terminated local franchise would ordinarily terminate or expire if the provider had not made the election under section 21 of this chapter. In applying for an initial certificate or a renewal certificate under this chapter, a provider shall agree to pay or perform the obligations described in this section, as required by section 16(b)(1)(D) of this chapter.

(e) A private person that claims to be:

(1) owed any rights, duties, or obligations by a holder under this section; and

(2) aggrieved by a holder's alleged violation of this section;

may bring an action in a court with jurisdiction to enforce the rights, duties, or obligations claimed to be owed to the person.

(f) As used in this section, "private person" does not include:

(1) the unit that issued the terminated local franchise;

(2) a political subdivision (as defined in IC 36-1-2-13) not described in subdivision (1); or

(3) any official, agent, or employee of:

(A) the unit that issued the terminated local franchise; or

(B) a political subdivision described in subdivision (2);

in the individual's official capacity.

Sec. 23. (a) Except as provided in subsection (b), the holder of a certificate under this chapter shall, at the end of each calendar quarter, determine under subsections (c) and (d) the gross revenue received during that quarter from the holder's provision of video service in each unit included in the holder's service area under the certificate.

(b) This subsection applies to a holder or other provider providing video service in a unit in which a provider of video service is required on June 30, 2006, to pay a franchise fee based on a percentage of gross revenues. The holder's or provider's gross revenue shall be determined as follows:

(1) If only one (1) local franchise is in effect on June 30, 2006, the holder or provider shall determine gross revenue as the term is defined in the local franchise in effect on June 30, 2006.

(2) If:

(A) more than one (1) local franchise is in effect on June 30, 2006; and

(B) the holder or provider is subject to a local franchise in the unit on June 30, 2006;

the holder or provider shall determine gross revenue as the term is defined in the local franchise to which the holder or provider is subject on June 30, 2006.

(3) If:

(A) more than one (1) local franchise is in effect on June 30, 2006; and

(B) the holder is not subject to a local franchise in the unit on June 30, 2006;

the holder shall determine gross revenue as the term is defined in the local franchise in effect on June 30, 2006, that is most favorable to the unit.

(c) This subsection does not apply to a holder that is required to determine gross revenue under subsection (b). The holder shall include the following in determining the gross revenue received during the quarter with respect to a particular unit:

(1) Fees and charges charged to subscribers for video service provided by the holder. Fees and charges under this subdivision include the following:

(A) Recurring monthly charges for video service.

(B) Event based charges for video service, including pay per view and video on demand charges.

(C) Charges for the rental of set top boxes and other equipment.

(D) Service charges related to the provision of video service, including activation, installation, repair, and maintenance charges.

(E) Administrative charges related to the provision of video service, including service order and service termination charges.

(2) Revenue received by an affiliate of the holder from the affiliate's provision of video service, to the extent that treating the revenue as revenue of the affiliate, instead of revenue of the holder, would have the effect of evading the payment of fees that would otherwise be paid to the unit. However, revenue of an affiliate may not be considered revenue of the holder if the revenue is otherwise subject to fees to be paid to the unit.

(d) This subsection does not apply to a holder that is required to determine gross revenue under subsection (b). The holder shall not include the following in determining the gross revenue received during the quarter with respect to a particular unit:

(1) Revenue not actually received, regardless of whether it is billed. Revenue described in this subdivision includes bad debt.

(2) Revenue received by an affiliate or any other person in exchange for supplying goods and services used by the holder to provide video service under the holder's certificate.

(3) Refunds, rebates, or discounts made to subscribers, advertisers, the unit, or other providers leasing access to the holder's facilities.

(4) Revenue from providing service other than video service, including revenue from providing:

(A) telecommunications service (as defined in 47 U.S.C. 153(46));

(B) information service (as defined in 47 U.S.C. 153(20)), other than video service; or

(C) any other service not classified as cable service or video programming by the Federal Communications Commission.

(5) Any fee imposed on the holder under this chapter that is

passed through to and paid by subscribers, including the franchise fee:

(A) imposed under section 24 of this chapter for the quarter immediately preceding the quarter for which gross revenue is being computed; and

(B) passed through to and paid by subscribers during the quarter for which gross revenue is being computed.

(6) Revenue from the sale of video service for resale in which the purchaser collects a franchise fee under:

(A) this chapter; or

(B) a local franchise agreement in effect on July 1, 2006;

from the purchaser's customers. This subdivision does not limit the authority of a unit, or the commission on behalf of a unit, to impose a tax, fee, or other assessment upon the purchaser under 42 U.S.C. 542(h).

(7) Any tax of general applicability:

(A) imposed on the holder or on subscribers by a federal, state, or local governmental entity; and

(B) required to be collected by the holder and remitted to the taxing entity;

including the state gross retail and use taxes (IC 6-2.5) and the utility receipts tax (IC 6-2.3).

(8) Any forgone revenue from providing free or reduced cost cable video service to any person, including:

(A) employees of the holder;

(B) the unit; or

(C) public institutions, public schools, or other governmental entities, as required or permitted by this chapter or by federal law.

However, any revenue that the holder chooses to forgo in exchange for goods or services through a trade or barter arrangement shall be included in gross revenue.

(9) Revenue from the sale of:

(A) capital assets; or

(B) surplus equipment that is not used by the purchaser to receive video service from the holder.

(10) Reimbursements that:

(A) are made by programmers to the holder for marketing costs incurred by the holder for the introduction of new programming; and

(B) exceed the actual costs incurred by the holder.

(11) Late payment fees collected from customers.

(12) Charges, other than those described in subsection (b)(1), that are aggregated or bundled with charges described in subsection (b)(1) on a customer's bill, if the holder can reasonably identify the charges on the books and records by the holder in the regular course of business.

(e) If, under the terms of the holder's certificate, the holder provides video service to any unincorporated area in Indiana, the holder shall calculate the holder's gross income received from each unincorporated area served in accordance with:

(1) subsection (b); or

(2) subsections (c) and (d);

whichever is applicable.

(f) If a unit served by the holder under a certificate annexes any territory after the certificate is issued or renewed under this chapter, the holder shall:

(1) include in the calculation of gross revenue for the annexing unit any revenue generated by the holder from providing video service to the annexed territory; and

(2) subtract from the calculation of gross revenue for any unit or unincorporated area:

(A) of which the annexed territory was formerly a part; and

(B) served by the holder before the effective date of the annexation;

the amount of gross revenue determined under subdivision (1);

beginning with the calculation of gross revenue for the calendar quarter in which the annexation becomes effective. The holder shall notify the commission of the new boundaries of the affected service areas as required under section 20(a)(7) of this chapter.

Sec. 24. (a) Subject to subsection (e), not later than forty-five (45) days after the end of each calendar quarter, the holder shall pay to each unit included in the holder's service area under a certificate issued under this chapter a franchise fee equal to:

(1) the amount of gross revenue received from providing video service in the unit during the most recent calendar quarter, as determined under section 23 of this chapter; multiplied by

(2) a percentage equal to one (1) of the following:

(A) If a local franchise has never been in effect in the unit before July 1, 2006, five percent (5%).

(B) If no local franchise is in effect in the unit on July 1,

2006, but one (1) or more local franchises have been in effect in the unit before July 1, 2006, the percentage of gross revenue paid by the holder of the most recent local franchise in effect in the unit, unless the unit elects to impose a different percentage, which may not exceed five percent (5%).

(C) If there is one (1) local franchise in effect in the unit on July 1, 2006, the percentage of gross revenue paid by the holder of that local franchise as a franchise fee to the unit, unless the unit elects to impose a different percentage, which may not exceed five percent (5%). Upon the expiration of a local franchise described in this clause, the percentage shall be determined by the unit but may not exceed five percent (5%).

(D) If there is more than one (1) local franchise in effect with respect to the unit on July 1, 2006, a percentage determined by the unit, which may not exceed the greater of:

(i) five percent (5%); or

(ii) the percentage paid by a holder of any local franchise in effect in the unit on July 1, 2006.

(b) If the holder provides video service to an unincorporated area in Indiana, as described in section 23(e) of this chapter, the holder shall:

(1) calculate the franchise fee with respect to the unincorporated area in accordance with subsection (a); and

(2) remit the franchise fee to the county in which the unincorporated area is located.

If an unincorporated area served by the provider is located in one (1) or more contiguous counties, the provider shall remit part of the franchise fee calculated under subdivision (1) to each county having territory in the unincorporated area served. The part of the franchise fee remitted to a county must bear the same proportion to the total franchise fee for the area, as calculated under subdivision (1), that the number of subscribers in the county bears to the total number of subscribers in the unincorporated area served.

(c) With each payment of a franchise fee to a unit under this section, the holder shall include a statement explaining the basis for the calculation of the franchise fee. A unit may review the books and records of:

(1) the holder; or

(2) an affiliate of the holder, if appropriate;

to the extent necessary to ensure the holder's compliance with section 23 of this chapter in calculating the gross revenue upon which the remitted franchise fee is based. Each party shall bear the party's own costs of an examination under this subsection. If the holder and the unit cannot agree on the amount of gross revenue on which the franchise fee should be based, either party may petition the commission to determine the amount of gross revenue on which the franchise fee should be based. A determination of the commission under this subsection is final, subject to the right of direct appeal by either party.

(d) A franchise fee owed by a holder to a unit under this section may be passed through to, and collected from, the holder's subscribers in the unit. To the extent allowed under 43 U.S.C. 542(c), the holder may identify as a separate line item on each regular bill issued to a subscriber:

(1) the amount of the total bill assessed as a franchise fee under this section; and

(2) the identity of the unit to which the franchise fee is paid.

(e) A holder that elects under section 21(b)(1) of this chapter to continue providing video service under a local franchise is not required to pay the franchise fee prescribed under this section, but shall pay any franchise fee imposed under the terms of the local franchise.

Sec. 25. (a) This section applies in a unit that:

(1) is included in the service area of a holder of a certificate issued under this chapter; and

(2) requires a provider described in section 21(a) of this chapter to provide PEG channel capacity, facilities, or financial support under a local franchise issued to the provider by the unit before July 1, 2006, regardless of whether the provider elects to:

(A) continue the local franchise under section 21(b)(1) of this chapter; or

(B) terminate the local franchise under section 21(b)(2) of this chapter and continue providing video service in the unit under a certificate issued under this chapter.

(b) As used in this section, "PEG channel" refers to a channel made available by a provider on the provider's video service system for public, educational, and governmental programming.

(c) The holder of a certificate under this chapter shall provide in the unit at least the number of PEG channels that the provider

described in section 21(a) of this chapter is required to provide in the unit under the terms of the local franchise described in subsection (a)(2).

(d) If the local franchise described in subsection (a)(2) requires the provider described in section 21(a) of this chapter to provide financial support for public, educational, or governmental programming in the unit, the holder of a certificate under this chapter shall pay the unit the same cash payments on a per subscriber basis that the provider described in section 21(a) of this chapter is required to pay the unit under the terms of the local franchise. The holder shall remit payments under this subsection to the unit on a quarterly basis, along with the franchise fee paid to the unit under section 24 of this chapter. For each calendar quarter, the holder shall remit to the unit an amount equal to:

(1) the cash payment for the quarter due from the provider described in section 21(a) of this chapter; multiplied by

(2) a fraction, the numerator of which equals the number of subscribers served by the holder in the unit, and the denominator of which equals the total number of subscribers served by all providers in the unit.

(e) Any payments remitted to a unit under subsection (d):

(1) are made:

(A) for the purposes set forth in 47 U.S.C. 531; and

(B) under the unit's authority under 47 U.S.C. 541(a)(4)(B); and

(2) may not be credited against the franchise fee payable to the unit under section 24 of this chapter.

Sec. 26. (a) This section applies in a unit or an unincorporated area of Indiana that:

(1) is included in the service area of a holder of a certificate issued under this chapter; and

(2) does not require a provider described in section 21(a) of this chapter to provide PEG channel capacity, facilities, or financial support under a local franchise issued before July 1, 2006.

(b) As used in this section, "PEG channel" has the meaning set forth in section 25(b) of this chapter.

(c) As a condition of issuing or renewing a certificate to a holder under this chapter, and upon:

(1) the petition of a unit or an unincorporated area included in the holder's service area under the certificate; or

(2) the commission's own motion;

the commission may require the holder to provide PEG channel capacity, facilities, or financial support to one (1) or more units or unincorporated areas in the holder's service area under the certificate.

(d) As allowed by 47 U.S.C. 531, the commission may do the following in exercising its authority under this section:

(1) Adopt rules and procedures for the designation or use of PEG channel capacity in each unit or unincorporated area in which the requirements apply.

(2) Enforce any requirement concerning the provision or use of PEG channel capacity. The commission's enforcement authority under this subdivision includes the authority to enforce any provision that:

(A) is proposed by the holder and incorporated in the holder's certificate; and

(B) concerns services, facilities, or equipment related to PEG channel capacity;

regardless of whether the provision is required in rules or procedures adopted by the commission under subdivision (1).

(3) If PEG channel capacity is designated under the certificate, prescribe rules and procedures:

(A) under which the holder is permitted to use the designated channel capacity to provide other services, if the channel capacity is not being used in the unit or unincorporated area for the designated purposes; and

(B) that set forth the conditions under which the holder must cease any use permitted under clause (A).

Sec. 26.5. (a) This section applies in a unit:

(1) that is included in the service area of a holder of a certificate issued under this chapter; and

(2) in which a provider is required to provide PEG channel capacity:

(A) under a local franchise issued to the provider by the unit before July 1, 2006; or

(B) by the commission under section 26 of this chapter.

(b) As used in this section, "PEG channel" has the meaning set forth in section 25(b) of this chapter.

(c) As a condition of issuing or renewing a certificate to a holder under this chapter, and upon:

(1) the petition of the unit; or

(2) the commission's own motion;

the commission may require the holder to provide the unit with

PEG channel capacity that is in addition to the channel capacity required to be provided in the unit under the existing local franchise or under an order of the commission under section 26 of this chapter.

Sec. 27. (a) The operation of a PEG channel provided under section 25, 26, or 26.5 of this chapter is the responsibility of the unit or unincorporated area that receives the benefit of the channel, and the holder or other provider is responsible only for the transmission of the channel.

(b) A unit or an unincorporated area that receives the benefit of a PEG channel provided under section 25, 26, or 26.5 of this chapter shall ensure that all transmissions, content, and programming that are transmitted over a channel or other facility of the provider are submitted to the provider in a manner or form that:

(1) is capable of being accepted and transmitted by the provider over the provider's video service system;

(2) does not require additional alteration or change in the content by the provider; and

(3) is compatible with the technology or protocol used by the provider to deliver video service.

(c) If it is technically feasible to do so, the holder of a certificate under this section and a provider described in section 21(a) of this chapter may cooperate to interconnect their systems to provide PEG channel capacity required under section 25, 26, or 26.5 of this chapter. Interconnection under this section may be accomplished by direct cable, microwave link, satellite, or other reasonable method of connection. The parties shall negotiate the terms of the interconnection in good faith, and a provider described in section 21(a) of this chapter may not withhold interconnection of PEG channel capacity.

(d) A court with jurisdiction has exclusive authority to enforce any requirement under:

(1) this section; or

(2) section 25, 26, or 26.5 of this chapter.

Sec. 28. (a) This section applies to the following:

(1) A provider that holds a certificate issued by the commission under this chapter.

(2) A provider that provides video service under a local franchise, as permitted under section 21(b)(1) of this chapter.

(b) Subject to section 17(b) of this chapter, a provider may not deny access to video service to any group of potential residential

subscribers based on the income level of the residents in the local area in which the group resides. However, a provider:

(1) shall have a reasonable time to become capable of providing video service to all households within a service area included in the provider's franchise; and

(2) may satisfy the requirements of this subsection through the use of an alternative technology that:

(A) offers content, service, and functionality comparable to that provided through the provider's video service system, as determined by the commission; and

(B) may include a technology that does not require the use of any public right-of-way.

(c) For purposes of this subsection, an "affected person" includes the following:

(1) A potential subscriber of video service from a provider.

(2) A local unit in which a person described in subdivision (1) resides, acting on behalf of the person or other similarly situated persons.

An affected person that alleges a violation of subsection (b) by a provider may petition the commission for equitable relief. Not later than forty-five (45) days after receiving a petition under this subsection, the commission shall, after notice and an opportunity for hearing, make a determination as to whether a violation of subsection (b) has occurred.

(d) If, after holding any hearing requested in the matter, the commission determines that no violation of subsection (b) has occurred, the commission's decision is final, subject to the petitioner's right to appeal the decision in a court having jurisdiction. If the commission determines that a violation of subsection (b) has occurred, the commission may issue an order requiring the provider to offer video service to those persons to whom access to the provider's video service has been denied. An order of the commission under this subsection must specify the following:

(1) A date by which the provider must offer video service to those persons to whom access has been denied as a result of the provider's violation. In specifying a date under this subdivision, the commission shall allow the provider a reasonable time to become capable of providing the required video service to the affected households.

(2) Any alternative technology described in subsection (b)(2) that the commission approves for use by the provider in

making video service available to the affected households. Except as provided in subsection (e), an order of the commission under this subsection is final.

(e) A provider may appeal:

(1) a determination by the commission under subsection (d) that a violation of subsection (b) has occurred; or

(2) any findings or requirements of the order issued in connection with the commission's finding of a violation;

in a court having jurisdiction.

Sec. 29. (a) This section applies to a provider that holds a local franchise to provide video service in a unit at any time before July 1, 2009, regardless of whether:

(1) the provider elects:

(A) under section 21(b)(1) of this chapter, to continue providing video service under the local franchise; or

(B) under section 21(b)(2) of this chapter, to terminate the local franchise and provide video service in the unit under a certificate issued under this chapter;

if the local franchise is in effect on June 30, 2009; or

(2) the provider will provide video service in the unit under a certificate issued under this chapter, if the local franchise expires before July 1, 2009.

(b) As used in this section, "local franchise" refers to:

(1) the existing local franchise, if subsection (a)(1)(A) applies;

(2) the terminated local franchise, if subsection (a)(1)(B) applies; or

(3) the most recent local franchise held by the provider in the unit, if subsection (a)(2) applies.

(c) A holder to which this section applies shall continue to provide the following services under the terms of the local franchise until January 1, 2009, or until the local franchise will expire or would have expired, whichever is later:

(1) Institutional network capacity, however defined or referenced in the local franchise, but generally including private line data network capacity for use by the unit for noncommercial purposes. Institutional network capacity provided under this subdivision shall continue to be provided at the same capacity as required under the terms of the local franchise.

(2) Video service to community public buildings, such as municipal buildings and public schools, however defined or referenced in the local franchise, but generally including cable

drop connections to the buildings and a particular tier of video service provided to the buildings. Video service provided under this subdivision shall continue to be provided to the same extent as required under the terms of the local franchise.

Beginning January 1, 2009, or upon the date on which the local franchise will expire or would have expired, whichever is later, a provider that provides services under this subsection shall continue to provide the services under this subsection if the unit requests that the services continue after December 31, 2008, or after the date the local franchise will expire or would have expired, whichever is later.

(d) This subsection applies to services described in subsection (c) that are provided after December 31, 2008, or after the date the local franchise will expire or would have expired, whichever is later. The incremental costs of the services shall be apportioned among all holders of a franchise to provide video service within the unit. The amount of the incremental costs borne by a particular holder is equal to the total cost of providing the services multiplied by a fraction calculated as follows:

(1) The numerator of the fraction equals the number of subscribers to whom the holder provides video service in the unit.

(2) The denominator of the fraction equals the total number of subscribers to whom all holders provide video service in the unit.

SECTION 59. IC 8-1-36 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]:

Chapter 36. Indiana Lifeline Assistance Program

Sec. 1. This chapter applies to an eligible telecommunications carrier that offers basic telecommunications service in one (1) or more exchange areas in Indiana.

Sec. 2. Except as otherwise provided in this chapter, the definitions in IC 8-1-2.6 apply throughout this chapter.

Sec. 3. As used in this chapter, "commission" refers to the Indiana utility regulatory commission created by IC 8-1-1-2.

Sec. 4. As used in this chapter, "eligible telecommunications carrier" refers to a local exchange carrier that is designated as an eligible telecommunications carrier by the commission under 47 CFR 54.201.

Sec. 5. As used in this chapter, "federal Lifeline program"

refers to the retail local service offering:

(1) available only to qualifying low-income consumers (as defined in 47 CFR 54.400(a));

(2) for which qualifying low-income consumers pay reduced charges as a result of the application of the Lifeline support amount described in 47 CFR 54.403; and

(3) that includes the services and functionalities set forth in 47 CFR 54.101(a)(1) through 47 CFR 54.101(a)(9);

as described in 47 CFR 54.401.

Sec. 6. As used in this chapter, "participant" refers to an eligible customer who applies for and receives assistance through the program.

Sec. 7. As used in this chapter, "program" refers to the Indiana Lifeline assistance program established by the commission under section 8 of this chapter.

Sec. 8. (a) Not later than July 1, 2008, the commission shall adopt rules under IC 4-22-2 to establish the Indiana Lifeline assistance program. The program shall offer reduced charges for basic telecommunications service to eligible customers. The rules adopted by the commission under this section must do the following:

(1) Require an eligible telecommunications carrier to offer toll limitation (as defined in 47 CFR 54.400(d)) to an eligible customer who applies for assistance under the program. The rules must specify that an eligible telecommunications carrier may not charge a participant an administrative charge or any other additional amount for toll limitation.

(2) Allow an eligible telecommunications carrier to block a participant's access to interexchange service, except for access to toll free numbers, if the participant owes an outstanding amount for basic telecommunications service. The rules must require an eligible telecommunications carrier to remove the block without additional cost to the participant upon payment of the outstanding amount.

(3) Prohibit an eligible telecommunications carrier from discontinuing basic telecommunications service to a participant because of nonpayment by the participant of charges for other services billed by the eligible telecommunications carrier, including interexchange service.

(b) Funding for the following costs of the program shall be determined by the commission, after notice and hearing, in a manner based on and consistent with comparable federal funding

mechanisms for the federal Lifeline program:

(1) The costs of reimbursing eligible telecommunications carriers for lost revenues associated with providing reduced charges for basic telecommunications service to participants.

(2) Reasonable expenses incurred by the commission and eligible telecommunications carriers to:

(A) administer the program; and

(B) publicize the availability of the program in a manner reasonably designed to reach eligible customers.

(c) The rules adopted by the commission under IC 4-22-2 to establish the program must:

(1) take effect not later than July 1, 2009; and

(2) be consistent with this chapter.

Upon the effective date of the rules adopted by the commission under this section, an eligible telecommunications carrier shall offer basic telecommunications service to an eligible customer at the reduced rates established under the rules.

Sec. 9. A customer is eligible to receive reduced rates for basic telecommunications service under the program if:

(1) the customer's income (as defined in 47 CFR 54.400(f)) does not exceed one hundred fifty percent (150%) of the federal poverty guidelines; or

(2) any person in the customer's household receives or has a child who receives any of the following:

(A) Medicaid.

(B) Food stamps.

(C) Supplemental Security Income.

(D) Federal public housing assistance.

(E) Home energy assistance under a program administered by the division of family resources under IC 12-14-11.

(F) Assistance under the federal Temporary Assistance to Needy Families (TANF) program (45 CFR 260 et seq.).

(G) Free lunches under the national school lunch program.

Sec. 10. An eligible telecommunications carrier may seek Tier Three federal Lifeline support under 47 CFR 54.403(a)(3) in connection with support provided by the eligible telecommunications carrier under this chapter.

SECTION 60. IC 35-45-5-4.7, AS ADDED BY P.L.70-2005, SECTION 7, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 4.7. (a) An interactive computer service that handles or retransmits a commercial electronic mail message has a right of action against a person who initiates or assists the transmission

of the commercial electronic mail message that violates this chapter.

(b) This chapter does not provide a right of action against:

(1) an interactive computer service;

(2) a telephone company; ~~(as defined in IC 8-1-2-88);~~

(3) a CMRS provider (as defined in IC 36-8-16.5-6);

(4) a cable operator (as defined in 47 U.S.C. 522(5)); or

(5) any other entity that primarily provides connectivity to an operator;

if the entity's equipment is used only to transport, handle, or retransmit information that violates this chapter and is not capable of blocking the retransmission of information that violates this chapter.

(c) It is a defense to an action under this section if the defendant shows by a preponderance of the evidence that the violation of this chapter resulted from a good faith error and occurred notwithstanding the maintenance of procedures reasonably adopted to avoid violating this chapter.

(d) If the plaintiff prevails in an action filed under this section, the plaintiff is entitled to the following:

(1) An injunction to enjoin future violations of this chapter.

(2) Compensatory damages equal to any actual damage proven by the plaintiff to have resulted from the initiation of the commercial electronic mail message. If the plaintiff does not prove actual damage, the plaintiff is entitled to presumptive damages of five hundred dollars ($500) for each commercial electronic mail message that violates this chapter and that is sent by the defendant:

(A) to the plaintiff; or

(B) through the plaintiff's interactive computer service.

(3) The plaintiff's reasonable attorney's fees and other litigation costs reasonably incurred in connection with the action.

(e) A person outside Indiana who:

(1) initiates or assists the transmission of a commercial electronic mail message that violates this chapter; and

(2) knows or should know that the commercial electronic mail message will be received in Indiana;

submits to the jurisdiction of Indiana courts for purposes of this chapter.

SECTION 61. THE FOLLOWING ARE REPEALED [EFFECTIVE UPON PASSAGE]: IC 8-1-2.6-3; IC 8-1-2.6-5; IC 8-1-2.6-7; IC 8-1-33-14.

SECTION 62. THE FOLLOWING ARE REPEALED [EFFECTIVE JULY 1, 2009]: IC 8-1-2-88; IC 8-1-2-88.5; IC 8-1-2.6-6; IC 8-1-17-6;

IC 8-1-17-21; IC 8-1-17-22; IC 8-1-17-22.5.

SECTION 63. [EFFECTIVE UPON PASSAGE] **(a) As used in this SECTION, "basic telecommunications service" has the meaning set forth in IC 8-1-2.6-0.1, as added by this act.**

(b) As used in this SECTION, "commission" refers to the Indiana utility regulatory commission created by IC 8-1-1-2.

(c) As used in this SECTION, "provider" has the meaning set forth in IC 8-1-2.6-0.4, as added by this act.

(d) Notwithstanding IC 8-1-2.6-1.4, as added by this act, the commission may, before July 1, 2009, take any action necessary to divest itself, by July 1, 2009, of any jurisdiction that:

(1) is not described in IC 8-1-2.6-1.5(b), as added by this act, or IC 8-1-2.6-13(d), as added by this act; and

(2) the commission exercises over basic telecommunications service before July 1, 2009.

(e) This SECTION expires January 1, 2010.

SECTION 64. [EFFECTIVE UPON PASSAGE] **(a) The definitions in IC 8-1-34, as added by this act, apply throughout this SECTION.**

(b) As used in this SECTION, "commission" refers to the Indiana utility regulatory commission created by IC 8-1-1-2.

(c) For the period beginning July 1, 2006, and ending June 30, 2010, the commission shall conduct an analysis of the deployment of video service in Indiana. In conducting the analysis required under this subsection, the commission shall determine and collect data on the following for each metropolitan statistical area in Indiana on at least an annual basis:

(1) The median per capita income of the metropolitan statistical area in relation to the median per capita income of the state.

(2) Whether the metropolitan statistical area is part of or includes an underserved area, as determined by the Indiana finance authority under IC 8-1-33-13, as amended by this act.

(3) An identification of each provider offering video service in the metropolitan statistical area. For each provider identified under this subdivision, the commission shall identify whether the provider offers video service in the metropolitan statistical area under:

(A) a local franchise; or

(B) a certificate issued by the commission under IC 8-1-34-17, as added by this act.

(4) For each provider identified under subdivision (3), the type of technology used to deliver the video service offered. In

compiling the information required under this subdivision, the commission may prepare a map identifying the location of the infrastructure used to provide video service within the metropolitan statistical area.

(5) For each provider identified under subdivision (3), any infrastructure build out initiated or completed within the metropolitan statistical area during the particular data collection period. For a provider that offers video service in the metropolitan statistical area under a local franchise, the commission shall identify whether the build out identified under this subdivision is required under the local franchise. In compiling the information required under this subdivision, the commission may prepare a map identifying the location of any build out that is initiated or completed.

(6) For each provider identified under subdivision (3), the provider's compliance with IC 8-1-34-28, as added by this act. The commission shall include in the data collected under this subdivision information on any complaint filed by an affected person under IC 8-1-34-28(c), as added by this act, including the commission's resolution of the complaint under IC 8-1-34-28(d).

(d) In the commission's report under IC 8-1-2.6-4 that is due to the regulatory flexibility committee on July 1, 2010, the commission shall include the results of the commission's analysis under subsection (c). The results reported must include the data collected under subsection (c) for each metropolitan statistical area in Indiana for each annual data collection period monitored by the commission during the four year period specified under subsection (c).

SECTION 65. [EFFECTIVE JULY 1, 2006] **(a)The definitions in IC 8-1-2.6 apply to this SECTION.**

(b) As used in this SECTION, "committee" refers to the regulatory flexibility committee established by IC 8-1-2.6-4.

(c) For purposes of this SECTION, a rate charged by a telecommunications provider is considered predatory if, for purposes of reporting to taxing authorities, the rate charged for a particular service is not set at or above the service's long run incremental cost.

(d) For the period beginning July 1, 2006, and ending June 30, 2008, the committee shall conduct an analysis of the rates charged by the telecommunications industry in Indiana for any service provided at the wholesale or retail level.

(e) The committee shall make a record of each instance of predatory pricing identified by the committee during the course of the analysis required under this SECTION.

(f) The committee shall report the findings of the analysis required under this SECTION to the legislative council before November 1, 2008. The report must include the committee's recommendations, if any, for regulatory or legislative intervention.

(g) The report and recommendations issued under this SECTION to the legislative council must be in an electronic format under IC 5-14-6.

(h) This SECTION expires January 1, 2009.

SECTION 66. **An emergency is declared for this act.**

Speaker of the House of Representatives

President of the Senate

President Pro Tempore

Governor of the State of Indiana

Date: _____ Time: _____

C o p y

Substitute for SENATE BILL No. 449

AN ACT concerning commerce; enacting the video competition act; amending K.S.A. 2005 Supp. 17-1902 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. Sections 1 through 6, and amendments thereto, shall be known and may be cited as the video competition act.

New Sec. 2. For purposes of the video competition act:

(a) "Cable service" is defined as set forth in 47 U.S.C. § 522(6).

(b) "Cable operator" is defined as set forth in 47 U.S.C. § 522(5).

(c) "Cable system" is defined as set forth in 47 U.S.C. § 522(7).

(d) "Competitive video service provider" means an entity providing video service that is not franchised as a cable operator in the state of Kansas as of the effective date of this act and is not an affiliate, successor or assign of such cable operator.

(e) "Franchise" means an initial authorization, or renewal of an authorization, issued by a municipality, regardless of whether the authorization is designed as a franchise, permit, license, resolution, contract, certificate, agreement or otherwise, that authorizes the construction and operation of a cable system.

(f) "Municipality" means a city or county.

(g) "Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station, as set forth in 47 U.S.C. § 522(20).

(h) "Video service" means video programming services provided through wireline facilities located at least in part in the public rights-of-way without regard to delivery technology, including internet protocol technology. This definition does not include any video programming provided by a commercial mobile service provider defined in 47 U.S.C. § 332(d).

(i) "Video service authorization" means the right of a video service provider to offer video programming to any subscribers anywhere in the state of Kansas.

(j) "Video service provider" means a cable operator or a competitive video service provider.

(k) "Video service provider fee" means the fee imposed upon video service providers pursuant to section 4 of this act.

New Sec. 3. (a) An entity or person seeking to provide cable service or video service in this state on or after July 1, 2006, shall file an application for a state-issued video service authorization with the state corporation commission as required by this section. The state corporation commission shall promulgate regulations to govern the state-issued video service authorization application process. The state, through the state corporation commission, shall issue a video service authorization permitting a video service provider to provide video service in the state, or amend a video service authorization previously issued, within 30 calendar days after receipt of a completed affidavit submitted by the video service applicant and signed by an officer or general partner of the applicant affirming:

(1) The location of the applicant's principal place of business and the names of the applicant's principal executive officers;

(2) that the applicant has filed or will timely file with the federal communications commission all forms required by that agency in advance of offering video service in this state;

(3) that the applicant agrees to comply with all applicable federal and state statutes and regulations;

(4) that the applicant agrees to comply with all lawful and applicable municipal regulations regarding the use and occupation of public rights-of-way in the delivery of the video service, including the police powers of the municipalities in which the service is delivered;

(5) the description of the service area footprint to be served within the state of Kansas, including any municipalities or parts thereof, and which may include certain designations of unincorporated areas, which description shall be updated by the applicant prior to the expansion of video service to a previously undesignated service area and, upon such expansion, notice to the state corporation commission of the service area to be served by the applicant; including:

(A) The period of time it shall take applicant to become capable of providing video programming to all households in the applicant's service

area footprint, which may not exceed five years from the date the authorization, or amended authorization, is issued; and

(B) a general description of the type or types of technologies the applicant will use to provide video programming to all households in its service area footprint, which may include wireline, wireless, satellite or any other alternative technology.

(b) The certificate of video service authorization issued by the state corporation commission shall contain:

(1) A grant of authority to provide video service as requested in the application;

(2) a statement that the grant of authority is subject to lawful operation of the video service by the applicant or its successor in interest.

(c) The certificate of video service authorization issued by the state corporation commission is fully transferable to any successor in interest to the applicant to which it is initially granted. A notice of transfer shall be filed with the state corporation commission and any relevant municipalities within 30 business days of the completion of such transfer.

(d) The certificate of video service authorization issued by the state corporation commission may be terminated by the video service provider by submitting notice to the state corporation commission.

(e) To the extent required by applicable law, any video service authorization granted by the state through the state corporation commission shall constitute a "franchise" for purposes of 47 U.S.C. § 541(b)(1). To the extent required for purposes of 47 U.S.C. §§ 521-561, only the state of Kansas shall constitute the exclusive "franchising authority" for video service providers in the state of Kansas.

(f) The holder of a state-issued video service authorization shall not be required to comply with any mandatory facility build-out provisions nor provide video service to any customer using any specific technology. Additionally, no municipality of the state of Kansas may:

(1) Require a video service provider to obtain a separate franchise to provide video service;

(2) impose any fee, license or gross receipts tax on video service providers, other than the fee specified in subsections (b) through (e) of section 4, and amendments thereto;

(3) impose any provision regulating rates charged by video service providers; or

(4) impose any other franchise or service requirements or conditions on video service providers, except that a video service provider must submit the agreement specified in subsection (a) of section 4, and amendments thereto.

(g) K.S.A. 12-2006 through 12-2011, and amendments thereto, shall not apply to video service providers.

(h) Not later than 120 days after a request by a municipality, the holder of a state-issued video service authorization shall provide the municipality with capacity over its video service to allow public, educational and governmental (PEG) access channels for noncommercial programming, according to the following:

(1) A video service provider shall not be required to provide more than two PEG access channels;

(2) the operation of any PEG access channel provided pursuant to this section shall be the responsibility of the municipality receiving the benefit of such channel, and the holder of a state-issued video service authorization bears only the responsibility for the transmission of such channel; and

(3) the municipality must ensure that all transmissions, content, or programming to be transmitted over a channel or facility by a holder of a state-issued video service authorization are provided or submitted to such video service provider in a manner or form that is capable of being accepted and transmitted by a provider, without requirement for additional alteration or change in the content by the provider, over the particular network of the video service provider, which is compatible with the technology or protocol utilized by the video service provider to deliver video services;

(i) in order to alert customers to any public safety emergencies, a video service provider shall offer the concurrent rebroadcast of local television broadcast channels, or utilize another economically and technically feasible process for providing an appropriate message through the

provider's video service in the event of a public safety emergency issued over the emergency broadcast system.

(j) (1) Valid cable franchises in effect prior to July 1, 2006, shall remain in effect subject to this section. Nothing in this act is intended to abrogate, nullify or adversely affect in any way any franchise or other contractual rights, duties and obligations existing and incurred by a cable operator or competitive video service provider before the enactment of this act. A cable operator providing video service over a cable system pursuant to a franchise issued by a municipality in effect on July 1, 2006, shall comply with the terms and conditions of such franchise until such franchise expires, is terminated pursuant to its terms or until the franchise is modified as provided in this section.

(2) Whenever two or more video service providers are providing service within the jurisdiction of a municipality, a cable operator with an existing municipally issued franchise agreement may request that the municipality modify the terms of the existing franchise agreement to conform to the terms and conditions of a state-issued video service authorization. The cable operator requesting a modification shall identify in writing the terms and conditions of its existing franchise that are materially different from the state-issued video service authorization, whether such differences impose greater or lesser burdens on the cable operator. Upon receipt of such request from a cable operator, the cable operator and the municipality shall negotiate the franchise modification terms in good faith for a period of 60 days. If within 60 days, the municipality and the franchised cable operator cannot reach agreeable terms, the cable operator may file a modification request pursuant to paragraph (3).

(3) Whenever two or more video service providers are providing service within the jurisdiction of a municipality, a cable operator may seek a modification of its existing franchise terms and conditions to conform to the terms and conditions of a state-issued video service authorization pursuant to 47 U.S.C. § 545; provided, however, that a municipality's review of such request shall conform to this section. In its application for modification, a franchised cable operator shall identify the terms and conditions of its municipally issued franchise that are materially different from the terms and conditions of the state-issued video service authorization, whether such differences impose greater or lesser burdens on the cable operator. The municipality shall grant the modification request within 120 days for any provisions where there are material differences between the existing franchise and the state-issued video service authorization. No provisions shall be exempt. A cable operator that is denied a modification request pursuant to this paragraph may appeal the denial to a court of competent jurisdiction which shall perform a de novo review of the municipality's denial consistent with this section.

(4) Nothing in this act shall preclude a cable operator with a valid municipally issued franchise from seeking enforcement of franchise provisions that require the equal treatment of competitive video service providers and cable operators within a municipality, but only to the extent such cable franchise provisions may be enforced to reform or modify such existing cable franchise. For purposes of interpreting such cable franchise provisions, a state-issued video service authorization shall be considered equivalent to a municipally issued franchise; provided, however, that the enforcement of such cable franchise provisions shall not affect the state-issued video service authorization in any way.

(k) Upon 90 days notice, a municipality may require a video service provider to comply with customer service requirements consistent with 47 C.F.R. § 76.309(c) for its video service with such requirements to be applicable to all video services and video service providers on a competitively neutral basis.

(l) A video service provider may not deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which such group resides.

(m) Within 180 days of providing video service in a municipality, the video service provider shall implement a process for receiving requests for the extension of video service to customers that reside in such municipality, but for which video service is not yet available from the provider to the residences of the requesting customers. The video service provider shall provide information regarding this request process to the municipality, who may forward such requests to the video service provider

on behalf of potential customers. Within 30 days of receipt, a video service provider shall respond to such requests as it deems appropriate and may provide information to the requesting customer about its video products and services and any potential timelines for the extension of video service to the customers area.

(n) A video service provider shall implement an informal process for handling municipality or customer inquiries, billing issues, service issues and other complaints. In the event an issue is not resolved through this informal process, a municipality may request a confidential, non-binding mediation with the video service provider, with the costs of such mediation to be shared equally between the municipality and provider. Should a video service provider be found by a court of competent jurisdiction to be in noncompliance with the requirements of this act, the court shall order the video service provider, within a specified reasonable period of time, to cure such noncompliance. Failure to comply shall subject the holder of the state-issued franchise of franchise authority to penalties as the court shall reasonably impose, up to and including revocation of the state-issued video service authorization. A municipality within which the video service provider offers video service may be an appropriate party in any such litigation.

New Sec. 4. (a) A video service provider shall provide notice to each municipality with jurisdiction in any locality at least 30 calendar days before providing video service in the municipality's jurisdiction. Within 30 days of the time notice is delivered to the municipality, the video service provider shall execute an agreement substantially similar to the following, which shall be filed with the city or county clerk and shall be effective immediately:

"[Video Service Provider] was granted authorization by the state of Kansas to provide video service in [Municipality] on [date] and hereby executes this agreement with [Municipality]. [Video Service Provider] will begin providing video service in [Municipality] on or after [date]. [Video Service Provider] may be contacted by the [Municipality] at the following telephone number _____. [Video Service Provider] may be contacted by customers at the following telephone number _____. [Video Service Provider] agrees to update this contact information with [Municipality] within 15 calendar days in the event that such contact information changes. [Video Service Provider] acknowledges and agrees to comply with [Municipality's] local right of way ordinance to the extent the ordinance is applicable to [Video Service Provider] and not contrary to state and federal laws and regulations. [Video Service Provider] hereby reserves the right to challenge the lawfulness or applicability of such ordinance to [Video Service Provider]. By entering into this agreement, neither the municipality's nor [Video Service Provider's] present or future legal rights, positions, claims, assertions or arguments before any administrative agency or court of law are in any way prejudiced or waived. By entering into the agreement, neither the municipality nor [Video Service Provider] waive any rights, but instead expressly reserve any and all rights, remedies and arguments the municipality or [Video Service Provider] may have at law or equity, without limitation, to argue, assert and/or take any position as to the legality or appropriateness of any present or future laws, ordinances and/or rulings."

(b) In any locality in which a video service provider offers video service, the video service provider shall calculate and pay the video service provider fee to the municipality with jurisdiction in that locality upon the municipality's written request. If the municipality makes such a request, the video service provider fee shall be due on a quarterly basis and shall be calculated as a percentage of gross revenues, as defined herein. Notwithstanding the date the municipality makes such a request, no video service provider fee shall be applicable until the first day of a calendar month that is at least 30 days after written notice of the levy is submitted by the municipality to a video service provider. The municipality may not demand the use of any other calculation method. Any video service provider fee shall be remitted to the municipality by the video service provider not later than 45 days after the end of the quarter.

(c) The percentage to be applied against gross revenues pursuant to subsection (b) shall be set by the municipality and identified in its written request, but may in no event exceed 5%.

(d) Gross revenues are limited to amounts billed to and collected from video service subscribers for the following:

(1) Recurring charges for video service;

(2) event-based charges for video service, including but not limited to pay-per-view and video-on-demand charges;

(3) rental of set top boxes and other video service equipment;

(4) service charges related to the provision of video service, including, but not limited to, activation, installation, repair and maintenance charges; and

(5) administrative charges related to the provision of video service, including, but not limited to, service order and service termination charges.

(e) Gross revenues do not include:

(1) Uncollectible fees, provided that all or part of uncollectible fees which is written off as bad debt but subsequently collected, less expenses of collection, shall be included in gross revenues in the period collected;

(2) late payment fees;

(3) amounts billed to video service subscribers to recover taxes, fees or surcharges imposed upon video service subscribers in connection with the provision of video service, including the video service provider fee authorized by this section; or

(4) charges, other than those described in subsection (d), that are aggregated or bundled with amounts billed to video service subscribers.

(f) At the request of a municipality, no more than once per year, the municipality may perform a reasonable audit of the video service provider's calculation of the video service provider fee.

(g) Any video service provider may identify and collect the amount of the video service provider fee as a separate line item on the regular bill of each subscriber. To the extent a video service provider incurs any costs in providing capacity for retransmitting community programming as may be required in subsection (h) of section 3, and amendments thereto, the provider may also recover these costs from customers, but may not deduct such costs from the video service provider fee due to a municipality under this section.

New Sec. 5. (a) The provisions of this act are intended to be consistent with the federal cable act, 47 U.S.C. § 521 et seq.

(b) Nothing in this act shall be interpreted to prevent a competitive video service provider, a cable operator or a municipality from seeking clarification of its rights and obligations under federal law or to exercise any right or authority under federal or state law.

New Sec. 6. (a) The state corporation commission shall:

(1) Assess the costs of any proceeding before the commission pursuant to this act against the parties to the proceeding; and

(2) establish and collect fees from entities and persons filing applications with the state corporation commission for state-issued video service authorizations, which fees shall be in amounts sufficient to pay the costs of administration of this act, including costs of personnel.

(b) The state corporation commission shall remit all moneys received by the commission pursuant to this section to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of the remittance, the state treasurer shall deposit the entire amount in the state treasury and credit it to the public service regulation fund.

Sec. 7. K.S.A. 2005 Supp. 17-1902 is hereby amended to read as follows: 17-1902. (a) (1) "Public right-of-way" means only the area of real property in which the city has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other nonwire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

(2) "Provider" ~~shall mean~~ *means* a local exchange carrier as defined in subsection (h) of K.S.A. 66-1,187, and amendments thereto, or a telecommunications carrier as defined in subsection (m) of K.S.A. 66-1,187,

and amendments thereto*, or a video service provider as defined in section 2, and amendments thereto*.

(3) "Telecommunications services" means providing the means of transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(4) "Competitive infrastructure provider" means an entity which leases, sells or otherwise conveys facilities located in the right-of-way, or the capacity or bandwidth of such facilities for use in the provision of telecommunications services, internet services or other intrastate and interstate traffic, but does not itself provide services directly to end users within the corporate limits of the city.

(b) Any provider shall have the right pursuant to this act to construct, maintain and operate poles, conduit, cable, switches and related appurtenances and facilities along, across, upon and under any public right-of-way in this state. Such appurtenances and facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such public ways or obstruct the legal use by other utilities.

(c) Nothing in this act shall be interpreted as granting a provider the authority to construct, maintain or operate any facility or related appurtenance on property owned by a city outside of the public right-of-way.

(d) The authority of a provider to use and occupy the public right-of-way shall always be subject and subordinate to the reasonable public health, safety and welfare requirements and regulations of the city. A city may exercise its home rule powers in its administration and regulation related to the management of the public right-of-way provided that any such exercise must be competitively neutral and may not be unreasonable or discriminatory. Nothing herein shall be construed to limit the authority of cities to require a competitive infrastructure provider to enter into a contract franchise ordinance.

(e) The city shall have the authority to prohibit the use or occupation of a specific portion of public right-of-way by a provider due to a reasonable public interest necessitated by public health, safety and welfare so long as the authority is exercised in a competitively neutral manner and is not unreasonable or discriminatory. A reasonable public interest shall include the following:

(1) The prohibition is based upon a recommendation of the city engineer, is related to public health, safety and welfare and is nondiscriminatory among providers, including incumbent providers;

(2) the provider has rejected a reasonable, competitively neutral and nondiscriminatory justification offered by the city for requiring an alternate method or alternate route that will result in neither unreasonable additional installation expense nor a diminution of service quality;

(3) the city reasonably determines, after affording the provider reasonable notice and an opportunity to be heard, that a denial is necessary to protect the public health and safety and is imposed on a competitively neutral and nondiscriminatory basis; or

(4) the specific portion of the public right-of-way for which the provider seeks use and occupancy is environmentally sensitive as defined by state or federal law or lies within a previously designated historic district as defined by local, state or federal law.

(f) A provider's request to use or occupy a specific portion of the public right-of-way shall not be denied without reasonable notice and an opportunity for a public hearing before the city governing body. A city governing body's denial of a provider's request to use or occupy a specific portion of the public right-of-way may be appealed to a district court.

(g) A provider shall comply with all laws and rules and regulations governing the use of public right-of-way.

(h) A city may not impose the following regulations on providers:

(1) Requirements that particular business offices or other telecommunications facilities be located in the city;

(2) requirements for filing applications, reports and documents that are not reasonably related to the use of a public right-of-way or this act;

(3) requirements for city approval of transfers of ownership or control of the business or assets of a provider's business, except that a city may require that such entity maintain current point of contact information and provide notice of a transfer within a reasonable time; and

(4) requirements concerning the provisioning of or quality of cus-

tomer services, facilities, equipment or goods in-kind for use by the city, political subdivision or any other provider or public utility.

(i) Unless otherwise required by state law, in the exercise of its lawful regulatory authority, a city shall promptly, and in no event more than 30 days, with respect to facilities in the public right-of-way, process each valid and administratively complete application of a provider for any permit, license or consent to excavate, set poles, locate lines, construct facilities, make repairs, effect traffic flow, obtain zoning or subdivision regulation approvals, or for other similar approvals, and shall make reasonable effort not to unreasonably delay or burden that provider in the timely conduct of its business. The city shall use its best reasonable efforts to assist the provider in obtaining all such permits, licenses and other consents in an expeditious and timely manner.

(j) If there is an emergency necessitating response work or repair, a provider may begin that repair or emergency response work or take any action required under the circumstances, provided that the ~~telecommunications~~ provider notifies the affected city promptly after beginning the work and timely thereafter meets any permit or other requirement had there not been such an emergency.

(k) A city may require a provider to repair all damage to a public right-of-way caused by the activities of that provider, or of any agent affiliate, employee, or subcontractor of that provider, while occupying, installing, repairing or maintaining facilities in a public right-of-way and to return the right-of-way, to its functional equivalence before the damage pursuant to the reasonable requirements and specifications of the city. If the provider fails to make the repairs required by the city, the city may effect those repairs and charge the provider the cost of those repairs. If a city incurs damages as a result of a violation of this subsection, then the city shall have a cause of action against a provider for violation of this subsection, and may recover its damages, including reasonable attorney fees, if the provider is found liable by a court of competent jurisdiction.

(l) If requested by a city, in order to accomplish construction and maintenance activities directly related to improvements for the health, safety and welfare of the public, a ~~telecommunications company promptly shall~~ *provider shall promptly* remove its facilities from the public right-of-way or shall relocate or adjust its facilities within the public right-of-way at no cost to the political subdivision. Such relocation or adjustment shall be completed as soon as reasonably possible within the time set forth in any request by the city for such relocation or adjustment. Any damages suffered by the city or its contractors as a result of such provider's failure to timely relocate or adjust its facilities shall be borne by such provider.

(m) No city shall create, enact or erect any unreasonable condition, requirement or barrier for entry into or use of the public rights-of-way by a provider.

(n) A city may assess any of the following fees against a provider, for use and occupancy of the public right-of-way, provided that such fees reimburse the city for its reasonable, actual and verifiable costs of managing the city right-of-way, and are imposed on all such providers in a nondiscriminatory and competitively neutral manner:

(1) A permit fee in connection with issuing each construction permit to set fixtures in the public right-of-way within that city as provided in K.S.A. 17-1901, and amendments thereto, to compensate the city for issuing, processing and verifying the permit application;

(2) an excavation fee for each street or pavement cut to recover the costs associated with construction and repair activity of the provider, their assigns, contractors and/or subcontractors with the exception of construction and repair activity required pursuant to subsection (l) of this act related to construction and maintenance activities directly related to improvements for the health, safety and welfare of the public; provided, however, imposition of such excavation fee must be based upon a regional specific or other appropriate study establishing the basis for such costs which takes into account the life of the city street prior to the construction or repair activity and the remaining life of the city street. Such excavation fee is expressly limited to activity that results in an actual street or pavement cut;

(3) inspection fees to recover all reasonable costs associated with city inspection of the work of the ~~telecommunications~~ provider in the right-of-way;

(4) repair and restoration costs associated with repairing and restoring the public right-of-way because of damage caused by the provider, its assigns, contractors, and/or subcontractors in the right-of-way; and

(5) a performance bond, in a form acceptable to the city, from a surety licensed to conduct surety business in the state of Kansas, insuring appropriate and timely performance in the construction and maintenance of facilities located in the public right-of-way.

(o) A city may not assess any additional fees against providers for use or occupancy of the public right-of-way other than those specified in subsection (n).

(p) This act may not be construed to affect any valid taxation of a ~~telecommunications~~ provider's facilities or services.

(q) Providers shall indemnify and hold the city and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury (including death), property damage or other harm for which recovery of damages is sought, to the extent that it is found by a court of competent jurisdiction to be caused by the negligence of the provider, any agent, officer, director, representative, employee, affiliate or subcontractor of the provider, or their respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining facilities in a public right-of-way. The indemnity provided by this subsection does not apply to any liability resulting from the negligence of the city, its officers, employees, contractors or subcontractors. If a provider and the city are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the city under state law and without waiving any defenses of the parties under state or federal law. This section is solely for the benefit of the city and provider and does not create or grant any rights, contractual or otherwise, to any other person or entity.

(r) A provider or city shall promptly advise the other in writing of any known claim or demand against the provider or the city related to or arising out of the provider's activities in a public right-of-way.

(s) Nothing contained in K.S.A. 17-1902, and amendments thereto, is intended to affect the validity of any franchise fees collected pursuant to state law or a city's home rule authority.

(t) Any ordinance enacted prior to the effective date of this act governing the use and occupancy of the public right-of-way by a provider shall not conflict with the provisions of this act.

New Sec. 8. If any word, phrase, sentence or provision of this act, sections 1 through 6 and K.S.A. 2005 Supp. 17-1902, and amendments thereto, or the application thereof to any person or circumstance is determined to be invalid, such invalidity shall not affect the other provisions or applications of this act and they shall be given effect without the invalid provisions or applications, and to this end the provisions of this act are declared to be severable.

Sec. 9. K.S.A. 2005 Supp. 17-1902 is hereby repealed.

Sec. 10. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

_____

SENATE adopted
Conference Committee Report _____

_____
President of the Senate.

_____
Secretary of the Senate.

Passed the HOUSE
as amended _____

HOUSE adopted
Conference Committee Report _____

_____
Speaker of the House.

_____
Chief Clerk of the House.

APPROVED _____

_____
Governor.

Assembly Bill No. 2987

CHAPTER 700

An act to amend Section 401 of, to add Article 4 (commencing with Section 440) to Chapter 2.5 of Part 1 of Division 1 of, and to add Division 2.5 (commencing with Section 5800) to, the Public Utilities Code, and to amend Section 107.7 of the Revenue and Taxation Code, relating to cable and video service.

[Approved by Governor September 29, 2006. Filed with Secretary of State September 29, 2006.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2987, Nunez. Cable and video service.

(1) Existing law provides that any city, county, or city and county may authorize by franchise or license the construction and operation of a community antenna television system and prescribe rules and regulations to protect the subscribers. Existing law requires that cable and video service providers comply with specified customer service standards and performance standards.

This bill would enact the Digital Infrastructure and Video Competition Act of 2006 and would establish a procedure for the issuance of state franchises for the provision of video service, which would be defined to include cable service and open-video systems, that would be administered by the Public Utilities Commission. The commission would be the sole franchising authority for state franchises to provide video services. The bill would require any person or corporation that seeks to provide video service in this state to file an application with the commission for a state franchise with specified information, signed under penalty of perjury. By creating a new crime, the bill would impose a state-mandated local program.

The bill would provide that cities, counties, cities and counties, or joint powers authorities would receive state franchise fees in exchange for the use of public rights-of-way for the delivery of video services provided within their jurisdictions, based on gross revenues, pursuant to a specified formula. The bill would prescribe the extent of the obligation of state franchise holders to provide public, educational, and governmental access (PEG) channels. The bill would also authorize local entities to establish a fee to support the costs of PEG channel facilities, in the amount of 1% of gross revenues, or more in specified circumstances.

The bill would also require these local entities to permit the installation of networks by holders of state franchises. The bill would also prohibit a holder of a state franchise from discriminating against or denying access to service to any group of potential residential subscribers because of their

income and would provide that this provision is satisfied if certain conditions are met by holders or their affiliates with 1,000,000 or more telephone customers or if alternative conditions are met by a holder or its affiliates with 1,000,000 or fewer telephone customers in California.

The bill would require the holder of a state franchise to notify a local entity that it will provide video service in the entity's jurisdiction at least 10 days before offering service. The bill would also require the local franchising entity to enforce customer service and protection standards and to enact an ordinance or resolution providing a schedule of penalties for any material breach of those standards by a holder of a state franchise, thereby imposing a state-mandated local program.

The bill would also require that any state franchise holder employing more than 750 employees in California make an annual report of specified information to the commission. The bill would also require that all state franchise holders make an annual report to the commission regarding availability of and subscription to broadband and video service.

The bill would provide that a state franchise is valid for 10 years and would require a provider to apply to the commission for renewal of the franchise for any additional 10-year period.

The bill would authorize the commission's Division of Ratepayer Advocates to advocate on behalf of video service customers in connection with state franchise renewal and enforcement of service standards.

The bill would prohibit the commission from permitting a telephone corporation that is providing video service pursuant to a state franchise to authorize an increase in rates for residential basic service until January 1, 2009, unless that corporation is regulated under rate of return regulation, subject to specified exceptions.

(2) Existing property tax law specifies the manner in which local tax assessors determine the value of cable television possessory interests that are created in a cable television franchise or license that is granted by a local government.

This bill would specify that this valuation method also applies to possessory interests created in a cable franchise or license or a franchise to provide video services that is granted by the state under the bill.

(3) Existing law provides for the Public Utilities Commission Utilities Reimbursement Account. Existing law authorizes the commission to annually determine a fee to be paid by every public utility providing service directly to customers or subscribers and subject to the jurisdiction of the commission, except for a railroad corporation. Existing law requires the commission to establish the fee, with the approval of the Department of Finance, to produce a total amount equal to that amount established in the authorized commission budget for the same year, and an appropriate reserve to regulate public utilities, less specified sources of funding.

This bill would establish a Video Franchising Account in the commission's Utilities Reimbursement Account, require the commission to annually determine a fee to be paid by an applicant or holder of a state

franchise, and authorize the commission to take various actions to collect the fees.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. Section 401 of the Public Utilities Code is amended to read:

401. (a) The Legislature finds and declares that the public interest is best served by a commission that is appropriately funded and staffed, that can thoroughly examine the issues before it, and that can take timely and well-considered action on matters before it. The Legislature further finds and declares that funding the commission by means of a reasonable fee imposed upon each common carrier and business related thereto, each public utility that the commission regulates, and each applicant for, or holder of, a state franchise pursuant to Division 2.5 (commencing with Section 5800), helps to achieve those goals and is, therefore, in the public interest.

(b) The Legislature intends, in enacting this chapter, that the fees levied and collected pursuant thereto produce enough, and only enough, revenues to fund the commission with (1) its authorized expenditures for each fiscal year to regulate common carriers and businesses related thereto, public utilities, and applicants and holders of a state franchise to be a video service provider, less the amount to be paid from special accounts except those established by this article, reimbursements, federal funds, and the unencumbered balance from the preceding year; (2) an appropriate reserve; and (3) any adjustment appropriated by the Legislature.

(c) For purposes of this chapter, an “appropriate reserve” means a reserve in addition to the commission’s total authorized annual budget to regulate common carriers and related businesses, public utilities, and applicants and holders of a state franchise to be a video service provider, to be determined by the commission based on its past and projected operating experience.

SEC. 2. Article 4 (commencing with Section 440) is added to Chapter 2.5 of Part 1 of Division 1 of the Public Utilities Code, to read:

Article 4. Video Service Franchises

440. (a) For purposes of this article, “state franchise,” “video service,” and “video service provider” shall have the same meaning as those terms are defined in Section 5830.

(b) The Public Utilities Commission Video Franchising Account is hereby created in the Public Utilities Commission Utilities Reimbursement Account.

441. The commission shall annually determine a fee to be paid by an applicant or holder of a state franchise pursuant to Division 2.5 (commencing with Section 5800). The annual fee shall be established to produce a total amount equal to that amount established in the authorized commission budget for the same year, including adjustments for increases in employee compensation, other increases appropriated by the Legislature, and an appropriate reserve to carry out the provisions of Division 2.5 (commencing with Section 5800), less the amount to be paid from reimbursements, federal funds, and any other revenues, and the amount of unencumbered funds from the preceding year.

442. (a) The commission shall establish the fee pursuant to Section 441 with the approval of the Department of Finance. The commission shall specify the amount of its budget to be financed by the fee in its annual budget request.

(b) The fee shall be determined and imposed by the commission consistent with the requirements of Section 542 of Title 47 of the United States Code.

(c) All fees collected by the commission pursuant to this section shall be transmitted to the Treasurer at least quarterly for deposit in the Public Utilities Commission Video Franchising Account.

(d) The commission shall maintain those records as are necessary to account separately for all fees and charges, including the fees authorized by Section 441.

(e) The commission shall authorize refunds of the fees provided for in this article when the fees were collected in error.

443. (a) The commission may require a video service provider subject to this article to furnish information and reports to the commission, at the time or times it specifies, to enable it to determine the fee pursuant to Section 441.

(b) Any video service provider required to submit information and reports under this article may, in lieu thereof, submit information or reports made to any other governmental agency if all of the following are met:

(1) The alternate information or reports contain all of the information required by the commission.

(2) The requirements to which the alternate reports or information are responsive are clearly identified.

(3) The information or reports are certified by the video service provider to be true and correct.

444. (a) If a video service provider subject to this article is in default of the payment of any fee required by this article for a period of 30 days or more, the commission may suspend or revoke the state franchise of the video service provider or order the video service provider to cease and desist from conducting all operations subject to the franchising authority of the commission. The commission may estimate from all available information the appropriate fee and may add to the amount of that estimated fee, a penalty not to exceed 25 percent of the amount, on account of the failure, refusal, or neglect to prepare and submit the report or to pay the fee, and the video service provider shall be estopped to complain of the amount of the commission's estimate.

(b) Upon payment of the fee so estimated and penalty, if applicable, the state franchise of the video service provider suspended in accordance with this section shall be reinstated or the order to cease and desist revoked. The commission may grant a reasonable extension of the 30-day period to any video service provider upon written application and a showing of the necessity of the extension.

(c) Upon revocation of any state franchise or issuance of an order to cease and desist pursuant to this section, all fees in default shall become due and payable immediately.

(d) The commission may bring an action, in its own name or in the name of the people of the state, in any court of competent jurisdiction, for the collection of delinquent fees estimated under this article, or for an amount due, owing, and unpaid to it, as shown by report filed by the commission, together with a penalty of 25 percent for the delinquency.

SEC. 3. Division 2.5 (commencing with Section 5800) is added to the Public Utilities Code, to read:

DIVISION 2.5. THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006

5800. This act shall be known and may be cited as the Digital Infrastructure and Video Competition Act of 2006.

5810. (a) The Legislature finds and declares all of the following:

(1) Increasing competition for video and broadband services is a matter of statewide concern for all of the following reasons:

(A) Video and cable services provide numerous benefits to all Californians including access to a variety of news, public information, education, and entertainment programming.

(B) Increased competition in the cable and video service sector provides consumers with more choice, lowers prices, speeds the deployment of new communication and broadband technologies, creates jobs, and benefits the California economy.

(C) To promote competition, the state should establish a state-issued franchise authorization process that allows market participants to use their

networks and systems to provide video, voice, and broadband services to all residents of the state.

(D) Competition for video service should increase opportunities for programming that appeals to California's diverse population and many cultural communities.

(2) Legislation to develop this new process should adhere to the following principles:

(A) Create a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider or technology over another.

(B) Promote the widespread access to the most technologically advanced cable and video services to all California communities in a nondiscriminatory manner regardless of socioeconomic status.

(C) Protect local government revenues and control of public rights-of-way.

(D) Require market participants to comply with all applicable consumer protection laws.

(E) Complement efforts to increase investment in broadband infrastructure and close the digital divide.

(F) Continue access to and maintenance of the public, education, and government (PEG) channels.

(G) Maintain all existing authority of the California Public Utilities Commission as established in state and federal statutes.

(3) The public interest is best served when sufficient funds are appropriated to the commission to provide adequate staff and resources to appropriately and timely process applications of video service providers and to ensure full compliance with the requirements of this division. It is the intent of the Legislature that, although video service providers are not public utilities or common carriers, the commission shall collect any fees authorized by this division in the same manner and under the same terms as it collects fees from common carriers, electrical corporations, gas corporations, telephone corporations, telegraph corporations, water corporations, and every other public utility providing service directly to customers or subscribers subject to its jurisdiction such that it does not discriminate against video service providers or their subscribers.

(4) Providing an incumbent cable operator the option to secure a state-issued franchise through the preemption of an existing cable franchise between a cable operator and any political subdivision of the state, including, but not limited to, a charter city, county, or city and county, is an essential element of the new regulatory framework established by this act as a matter of statewide concern to best ensure equal protection and parity among providers and technologies, as well as to achieve the goals stated by the Legislature in enacting this act.

(b) It is the intent of the Legislature that a video service provider shall pay as rent a franchise fee to the local entity in whose jurisdiction service is being provided for the continued use of streets, public facilities, and other rights-of-way of the local entity in order to provide service. The

Legislature recognizes that local entities should be compensated for the use of the public rights-of-way and that the franchise fee is intended to compensate them in the form of rent or a toll, similar to that which the court found to be appropriate in Santa Barbara County Taxpayers Association v. Board of Supervisors for the County of Santa Barbara (1989) 257 Cal. App. 615.

(c) It is the intent of the Legislature that collective bargaining agreements be respected.

(d) It is the intent of the Legislature that the definition of gross revenues in this division shall result in local entities maintaining their existing level of revenue from franchise fees.

5820. (a) Nothing in this division shall be deemed as creating a vested right in a state-issued franchise by the franchise holder or its affiliates that would preclude the state from amending the provisions that establish the terms and conditions of a franchise.

(b) Nothing in this division shall be construed to eliminate or reduce a telephone corporation's or video service provider's obligations under any applicable state or federal environmental protection laws. The local entity shall serve as the lead agency for any environmental review under this division and may impose conditions to mitigate environmental impacts of the applicant's use of the public rights-of-way that may be required pursuant to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(c) The holder of a state franchise shall not be deemed a public utility as a result of providing video service under this division. This division shall not be construed as granting authority to the commission to regulate the rates, terms, and conditions of video services, except as explicitly set forth in this division.

5830. For purposes of this division, the following words have the following meanings:

(a) "Broadband" means any service defined as broadband in the most recent Federal Communications Commission inquiry pursuant to Section 706 of the Telecommunications Act of 1996 (P.L. 104-104).

(b) "Cable operator" means any person or group of persons that either provides cable service over a cable system and directly, or through one or more affiliates, owns a significant interest in a cable system; or that otherwise controls or is responsible for, through any arrangement, the management and operation of a cable system, as set forth in Section 522(5) of Title 47 of the United States Code.

(c) "Cable service" is defined as the one-way transmission to subscribers of either video programming, or other programming service, and subscriber interaction, if any, that is required for the selection or use of video programming or other programming service, as set forth in Section 522(6) of Title 47 of the United States Code.

(d) "Cable system" is defined as set forth in Section 522(7) of Title 47 of the United States Code.

(e) "Commission" means the Public Utilities Commission.

(f) “Franchise” means an initial authorization, or renewal of an authorization, issued by a franchising entity, regardless of whether the authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, that authorizes the construction and operation of any network in the right-of-way capable of providing video service to subscribers.

(g) “Franchise fee” means the fee adopted pursuant to Section 5840.

(h) “Local franchising entity” means the city, county, city and county, or joint powers authority entitled to require franchises and impose fees on cable operators, as set forth in Section 53066 of the Government Code.

(i) “Holder” means a person or group of persons that has been issued a state franchise from the commission pursuant to this division.

(j) “Incumbent cable operator” means a cable operator or OVS serving subscribers under a franchise in a particular city, county, or city and county franchise area on January 1, 2007.

(k) “Local entity” means any city, county, city and county, or joint powers authority within the state within whose jurisdiction a holder of a state franchise under this division may provide cable service or video service.

(*l*) “Network” means a component of a facility that is wholly or partly physically located within a public right-of-way and that is used to provide video service, cable service, voice, or data services.

(m) “Open-video system” or “OVS” means those services set forth in Section 573 of Title 47 of the United States Code.

(n) “OVS operator” means any person or group of persons that either provides cable service over an open-video system directly, or through one or more affiliates, owns a significant interest in an open-video system, or that otherwise controls or is responsible for, through any arrangement, the management of an open-video system.

(o) “Public right-of-way” means the area along and upon any public road or highway, or along or across any of the waters or lands within the state.

(p) “State franchise” means a franchise that is issued pursuant to this division.

(q) “Subscriber” means a person who lawfully receives video service from the holder of a state franchise for a fee.

(r) “Video programming” means programming provided by, or generally considered comparable to programming provided by, a television broadcast station, as set forth in Section 522(20) of Title 47 of the United States Code.

(s) “Video service” means video programming services, cable service, or OVS service provided through facilities located at least in part in public rights-of-way without regard to delivery technology, including Internet protocol or other technology. This definition does not include (1) any video programming provided by a commercial mobile service provider defined in Section 322(d) of Title 47 of the United States Code, or (2) video programming provided as part of, and via, a service that enables

users to access content, information, electronic mail, or other services offered over the public Internet.

(t) "Video service provider" means an entity providing video service.

5840. (a) The commission is the sole franchising authority for a state franchise to provide video service under this division. Neither the commission nor any local franchising entity or other local entity of the state may require the holder of a state franchise to obtain a separate franchise or otherwise impose any requirement on any holder of a state franchise except as expressly provided in this division. Sections 53066, 53066.01, 53066.2, and 53066.3 of the Government Code shall not apply to holders of a state franchise.

(b) The application process described in this section and the authority granted to the commission under this section shall not exceed the provisions set forth in this section.

(c) Any person or corporation who seeks to provide video service in this state for which a franchise has not already been issued, after January 1, 2008, shall file an application for a state franchise with the commission. The commission may impose a fee on the applicant that shall not exceed the actual and reasonable costs of processing the application and shall not be levied for general revenue purposes.

(d) No person or corporation shall be eligible for a state-issued franchise, including a franchise obtained from renewal or transfer of an existing franchise, if that person or corporation is in violation of any final nonappealable order relating to either the Cable Television and Video Provider Customer Service and Information Act (Article 3.5 (commencing with Section 53054) of Chapter 1 of Part 1 of Division 2 of Title 5 of the Government Code) or the Video Customer Service Act (Article 4.5 (commencing with Section 53088) of Chapter 1 of Part 1 of Division 2 of Title 5 of the Government Code).

(e) The application for a state franchise shall be made on a form prescribed by the commission and shall include all of the following:

(1) A sworn affidavit, signed under penalty of perjury by an officer or another person authorized to bind the applicant, that affirms all of the following:

(A) That the applicant has filed or will timely file with the Federal Communications Commission all forms required by the Federal Communications Commission before offering cable service or video service in this state.

(B) That the applicant or its affiliates agrees to comply with all federal and state statutes, rules, and regulations, including, but not limited to, the following:

(i) A statement that the applicant will not discriminate in the provision of video or cable services as provided in Section 5890.

(ii) A statement that the applicant will abide by all applicable consumer protection laws and rules as provided in Section 5900.

(iii) A statement that the applicant will remit the fee required by subdivision (a) of Section 5860 to the local entity.

(iv) A statement that the applicant will provide PEG channels and the required funding as required by Section 5870.

(C) That the applicant agrees to comply with all lawful city, county, or city and county regulations regarding the time, place, and manner of using the public rights-of-way, including, but not limited to, payment of applicable encroachment, permit, and inspection fees.

(D) That the applicant will concurrently deliver a copy of the application to any local entity where the applicant will provide service.

(2) The applicant's legal name and any name under which the applicant does or will do business in this state.

(3) The address and telephone number of the applicant's principal place of business, along with contact information for the person responsible for ongoing communications with the department.

(4) The names and titles of the applicant's principal officers.

(5) The legal name, address, and telephone number of the applicant's parent company, if any.

(6) A description of the video service area footprint that is proposed to be served, as identified by a collection of United States Census Bureau Block numbers (13 digit) or a geographic information system digital boundary meeting or exceeding national map accuracy standards. This description shall include the socioeconomic status information of all residents within the service area footprint.

(7) If the applicant is a telephone corporation or an affiliate of a telephone corporation, as defined in Section 234, a description of the territory in which the company provides telephone service. The description shall include socioeconomic status information of all residents within the telephone corporation's service territory.

(8) The expected date for the deployment of video service in each of the areas identified in paragraph (6).

(9) Adequate assurance that the applicant possesses the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way caused by the applicant. To accomplish these requirements, the commission may require a bond.

(f) The commission may require that a corporation with wholly owned subsidiaries or affiliates is eligible only for a single state-issued franchise and prohibit the holding of multiple franchises through separate subsidiaries or affiliates. The commission may establish procedures for a holder of a state-issued franchise to amend its franchise to reflect changes in its service area.

(g) The commission shall commence accepting applications for a state franchise no later than April 1, 2007.

(h) (1) The commission shall notify an applicant for a state franchise and any affected local entities whether the applicant's application is complete or incomplete before the 30th calendar day after the applicant submits the application.

(2) If the commission finds the application is complete, it shall issue a state franchise before the 14th calendar day after that finding.

(3) If the commission finds that the application is incomplete, it shall specify with particularity the items in the application that are incomplete and permit the applicant to amend the application to cure any deficiency. The commission shall have 30 calendar days from the date the application is amended to determine its completeness.

(4) The failure of the commission to notify the applicant of the completeness or incompleteness of the application before the 44th calendar day after receipt of an application shall be deemed to constitute issuance of the certificate applied for without further action on behalf of the applicant.

(i) The state franchise issued by the commission shall contain all of the following:

(1) A grant of authority to provide video service in the service area footprint as requested in the application.

(2) A grant of authority to use the public rights-of-way, in exchange for the franchise fee adopted under subdivision (q), in the delivery of video service, subject to the laws of this state.

(3) A statement that the grant of authority is subject to lawful operation of the cable service or video service by the applicant or its successor in interest.

(j) The state franchise issued by the commission may be terminated by the video service provider by submitting at least 90 days prior written notice to customers, local entities, and the commission.

(k) It is unlawful to provide video service without a state or locally issued franchise.

(*l*) Subject to the notice requirements of this division, a state franchise may be transferred to any successor in interest of the holder to which the certificate is originally granted, provided that the transferee first submits all of the information required of the applicant by this section to the commission.

(m) In connection with, or as a condition of, receiving a state franchise, the commission shall require a holder to notify the commission and any applicable local entity within 14 business days of any of the following changes involving the holder or the state franchise:

(1) Any transaction involving a change in the ownership, operation, control, or corporate organization of the holder, including a merger, an acquisition, or a reorganization.

(2) A change in the holder's legal name or the adoption of, or change to, an assumed business name. The holder shall submit to the commission a certified copy of either of the following:

(A) The proposed amendment to the state franchise.

(B) The certificate of assumed business name.

(3) A change in the holder's principal business address or in the name of the person authorized to receive notice on behalf of the holder.

(4) Any transfer of the state franchise to a successor in interest of the holder. The holder shall identify the successor in interest to which the transfer is made.

(5) The termination of any state franchise issued under this division. The holder shall identify both of the following:

(A) The number of customers in the service area covered by the state franchise being terminated.

(B) The method by which the holder's customers were notified of the termination.

(6) A change in one or more of the service areas of this division that would increase or decrease the territory within the service area. The holder shall describe the new boundaries of the affected service areas after the proposed change is made.

(n) Prior to offering video service in a local entity's jurisdiction, the holder of a state franchise shall notify the local entity that the video service provider will provide video service in the local entity's jurisdiction. The notice shall be given at least 10 days, but no more than 60 days, before the video service provider begins to offer service.

(o) Any video service provider that currently holds a franchise with a local franchising entity is entitled to seek a state franchise in the area designated in that franchise upon meeting any of the following conditions:

(1) The expiration, prior to any renewal or extension, of its local franchise.

(2) A mutually agreed upon date set by both the local franchising entity and video service provider to terminate the franchise provided in writing by both parties to the commission.

(3) When a video service provider that holds a state franchise provides the notice required pursuant to subdivision (m) to a local jurisdiction that it intends to initiate providing video service in all or part of that jurisdiction, a video service provider operating under a franchise issued by a local franchising authority may elect to obtain a state franchise to replace its locally issued franchise. The franchise issued by the local franchising entity shall terminate and be replaced by a state franchise when the state franchising authority issues a state franchise for the video service provider that includes the entire service area served by the video service provider and the video service provider notifies the local entity that it will begin providing video service in that area under a state franchise.

(p) Notwithstanding any rights to the contrary, an incumbent cable operator opting into a state franchise under this subdivision shall continue to serve all areas as required by its local franchise agreement existing on January 1, 2007, until that local franchise otherwise would have expired. However, an incumbent cable operator that is also a telephone corporation with less than 1,000,000 telephone customers in California and is providing video service in competition with another incumbent cable operator shall not be required to provide service beyond the area in which it is providing video service as of January 1, 2007.

(q) (1) There is hereby adopted a state franchise fee payable as rent or a toll for the use of the public right-of-way by holders of the state franchise issued pursuant to this division. The amount of the state franchise fee shall be 5 percent of gross revenues, as defined in subdivision (d) of Section 5860, or the percentage applied by the local entity to the gross revenue of the incumbent cable operator, whichever is less. If there is no incumbent cable operator or upon the expiration of the incumbent cable operator's franchise, the amount of the state franchise fee shall be 5 percent of gross revenues, as defined in subdivision (d) of Section 5860, unless the local entity adopts an ordinance setting the amount of the franchise fee at less than 5 percent.

(2) (A) The state franchise fee shall apply equally to all video service providers in the local entity's jurisdiction.

(B) Notwithstanding subparagraph (A), if the video service provider is leasing access to a network owned by a local entity, the local entity may set a franchise fee for access to the network different from the franchise fee charged to a video service provider for access to the rights-of-way to install its own network.

5850. (a) A state-issued franchise shall only be valid for 10 years after the date of issuance, and the video service provider shall apply for a renewal of the state franchise for an additional 10-year period if it wishes to continue to provide video services in the area covered by the franchise after the expiration of the franchise.

(b) Except as provided in this section, the criteria and process described in Section 5840 shall apply to a renewal registration, and the commission shall not impose any additional or different criteria.

(c) Renewal of a state franchise shall be consistent with federal law and regulations.

(d) The commission shall not renew the franchise if the video service provider is in violation of any final nonappealable court order issued pursuant to this division.

5860. (a) The holder of a state franchise that offers video service within the jurisdiction of the local entity shall calculate and remit to the local entity a state franchise fee, adopted pursuant to subdivision (q) of Section 5840, as provided in this section. The obligation to remit the franchise fee to a local entity begins immediately upon provision of video service within that local entity's jurisdiction. However, the remittance shall not be due until the time of the first quarterly payment required under subdivision (g) that is at least 180 days after the provision of service began. The fee remitted to a city or city and county shall be based on gross revenues, as defined in subdivision (d), derived from the provision of video service within that jurisdiction. The fee remitted to a county shall be based on gross revenues earned within the unincorporated area of the county. No fee under this section shall become due unless the local entity provides documentation to the holder of the state franchise supporting the percentage paid by the incumbent cable operator serving the area within the local entity's jurisdiction, as provided below. The fee shall be

calculated as a percentage of the holder's gross revenues, as defined in subdivision (d). The fee remitted to the local entity pursuant to this section may be used by the local entity for any lawful purpose.

(b) The state franchise fee shall be a percentage of the holder's gross revenues, as defined in subdivision (d).

(c) No local entity or any other political subdivision of this state may demand any additional fees or charges or other remuneration of any kind from the holder of a state franchise based solely on its status as a provider of video or cable services other than as set forth in this division and may not demand the use of any other calculation method or definition of gross revenues. However, nothing in this section shall be construed to limit a local entity's ability to impose utility user taxes and other generally applicable taxes, fees, and charges under other applicable provisions of state law that are applied in a nondiscriminatory and competitively neutral manner.

(d) For purposes of this section, the term "gross revenues" means all revenue actually received by the holder of a state franchise, as determined in accordance with generally accepted accounting principles, that is derived from the operation of the holder's network to provide cable or video service within the jurisdiction of the local entity, including all of the following:

(1) All charges billed to subscribers for any and all cable service or video service provided by the holder of a state franchise, including all revenue related to programming provided to the subscriber, equipment rentals, late fees, and insufficient fund fees.

(2) Franchise fees imposed on the holder of a state franchise by this section that are passed through to, and paid by, the subscribers.

(3) Compensation received by the holder of a state franchise that is derived from the operation of the holder's network to provide cable service or video service with respect to commissions that are paid to the holder of a state franchise as compensation for promotion or exhibition of any products or services on the holder's network, such as a "home shopping" or similar channel, subject to paragraph (4) of subdivision (e).

(4) A pro rata portion of all revenue derived by the holder of a state franchise or its affiliates pursuant to compensation arrangements for advertising derived from the operation of the holder's network to provide video service within the jurisdiction of the local entity, subject to paragraph (1) of subdivision (e). The allocation shall be based on the number of subscribers in the local entity divided by the total number of subscribers in relation to the relevant regional or national compensation arrangement.

(e) For purposes of this section, the term "gross revenue" set forth in subdivision (d) does not include any of the following:

(1) Amounts not actually received, even if billed, such as bad debt; refunds, rebates, or discounts to subscribers or other third parties; or revenue imputed from the provision of cable services or video services for free or at reduced rates to any person as required or allowed by law,

including, but not limited to, the provision of these services to public institutions, public schools, governmental agencies, or employees except that forgone revenue chosen not to be received in exchange for trades, barters, services, or other items of value shall be included in gross revenue.

(2) Revenues received by any affiliate or any other person in exchange for supplying goods or services used by the holder of a state franchise to provide cable services or video services. However, revenue received by an affiliate of the holder from the affiliate's provision of cable or video service shall be included in gross revenue as follows:

(A) To the extent that treating the revenue as revenue of the affiliate, instead of revenue of the holder, would have the effect of evading the payment of fees that would otherwise be paid to the local entity.

(B) The revenue is not otherwise subject to fees to be paid to the local entity.

(3) Revenue derived from services classified as noncable services or nonvideo services under federal law, including, but not limited to, revenue derived from telecommunications services and information services, other than cable services or video services, and any other revenues attributed by the holder of a state franchise to noncable services or nonvideo services in accordance with Federal Communications Commission rules, regulations, standards, or orders.

(4) Revenue paid by subscribers to "home shopping" or similar networks directly from the sale of merchandise through any home shopping channel offered as part of the cable services or video services. However, commissions or other compensation paid to the holder of a state franchise by "home shopping" or similar networks for the promotion or exhibition products or services shall be included in gross revenue.

(5) Revenue from the sale of cable services or video services for resale in which the reseller is required to collect a fee similar to the franchise fee from the reseller's customers.

(6) Amounts billed to, and collected from, subscribers to recover any tax, fee, or surcharge imposed by any governmental entity on the holder of a state franchise, including, but not limited to, sales and use taxes, gross receipts taxes, excise taxes, utility users taxes, public service taxes, communication taxes, and any other fee not imposed by this section.

(7) Revenue from the sale of capital assets or surplus equipment not used by the purchaser to receive cable services or video services from the seller of those assets or surplus equipment.

(8) Revenue from directory or Internet advertising revenue, including, but not limited to, yellow pages, white pages, banner advertisement, and electronic publishing.

(9) Revenue received as reimbursement by programmers of specific, identifiable marketing costs incurred by the holder of a state franchise for the introduction of new programming.

(10) Security deposits received from subscribers, excluding security deposits applied to the outstanding balance of a subscriber's account and thereby taken into revenue.

(f) For the purposes of this section, in the case of a video service that may be bundled or integrated functionally with other services, capabilities, or applications, the state franchise fee shall be applied only to the gross revenue, as defined in subdivision (d), attributable to video service. Where the holder of a state franchise or any affiliate bundles, integrates, ties, or combines video services with nonvideo services creating a bundled package, so that subscribers pay a single fee for more than one class of service or receive a discount on video services, gross revenues shall be determined based on an equal allocation of the package discount, that is, the total price of the individual classes of service at advertised rates compared to the package price, among all classes of service comprising the package. The fact that the holder of a state franchise offers a bundled package shall not be deemed a promotional activity. If the holder of a state franchise does not offer any component of the bundled package separately, the holder of a state franchise shall declare a stated retail value for each component based on reasonable comparable prices for the product or service for the purpose of determining franchise fees based on the package discount described above.

(g) For the purposes of determining gross revenue under this division, a video service provider shall use the same method of determining revenues under generally accepted accounting principals as that which the video service provider uses in determining revenues for the purpose of reporting to national and state regulatory agencies.

(h) The state franchise fee shall be remitted to the applicable local entity quarterly, within 45 days after the end of the quarter for that calendar quarter. Each payment shall be accompanied by a summary explaining the basis for the calculation of the state franchise fee. If the holder does not pay the franchise fee when due, the holder shall pay a late payment charge at a rate per year equal to the highest prime lending rate during the period of delinquency, plus 1 percent. If the holder has overpaid the franchise fee, it may deduct the overpayment from its next quarterly payment.

(i) Not more than once annually, a local entity may examine the business records of a holder of a state franchise to the extent reasonably necessary to ensure compensation in accordance with subdivision (a). The holder shall keep all business records reflecting any gross revenues, even if there is a change in ownership, for at least four years after those revenues are recognized by the holder on its books and records. If the examination discloses that the holder has underpaid franchise fees by more than 5 percent during the examination period, the holder shall pay all of the reasonable and actual costs of the examination. If the examination discloses that the holder has not underpaid franchise fees, the local entity shall pay all of the reasonable and actual costs of the examination. In every other instance, each party shall bear its own costs of the examination. Any claims by a local entity that compensation is not in accordance with subdivision (a), and any claims for refunds or other corrections to the remittance of the holder of a state franchise, shall be made within three

years and 45 days of the end of the quarter for which compensation is remitted, or three years from the date of the remittance, whichever is later. Either a local entity or the holder may, in the event of a dispute concerning compensation under this section, bring an action in a court of competent jurisdiction.

(j) The holder of a state franchise may identify and collect the amount of the state franchise fee as a separate line item on the regular bill of each subscriber.

5870. (a) The holder of a state franchise shall designate a sufficient amount of capacity on its network to allow the provision of the same number of public, educational, and governmental access (PEG) channels, as are activated and provided by the incumbent cable operator that has simultaneously activated and provided the greatest number of PEG channels within the local entity under the terms of any franchise in effect in the local entity as of January 1, 2007. For the purposes of this section, a PEG channel is deemed activated if it is being utilized for PEG programming within the municipality for at least eight hours per day. The holder shall have three months from the date the local entity requests the PEG channels to designate the capacity. However, the three-month period shall be tolled by any period during which the designation or provision of PEG channel capacity is technically infeasible, including any failure or delay of the incumbent cable operator to make adequate interconnection available, as required by this section.

(b) The PEG channels shall be for the exclusive use of the local entity or its designee to provide public, educational, and governmental channels. The PEG channels shall be used only for noncommercial purposes. However, advertising, underwriting, or sponsorship recognition may be carried on the channels for the purpose of funding PEG-related activities. The PEG channels shall all be carried on the basic service tier. To the extent feasible, the PEG channels shall not be separated numerically from other channels carried on the basic service tier and the channel numbers for the PEG channels shall be the same channel numbers used by the incumbent cable operator unless prohibited by federal law. After the initial designation of PEG channel numbers, the channel numbers shall not be changed without the agreement of the local entity unless the change is required by federal law. Each channel shall be capable of carrying a National Television System Committee (NTSC) television signal.

(c) (1) If less than three PEG channels are activated and provided within the local entity as of January 1, 2007, a local entity whose jurisdiction lies within the authorized service area of the holder of a state franchise may initially request the holder to designate not more than a total of three PEG channels.

(2) The holder shall have three months from the date of the request to designate the capacity. However, the three-month period shall be tolled by any period during which the designation or provision of PEG channel capacity is technically infeasible, including any failure or delay of the

incumbent cable operator to make adequate interconnection available, as required by this section.

(d) (1) The holder shall provide an additional PEG channel when the nonduplicated locally produced video programming televised on a given channel exceeds 56 hours per week as measured on a quarterly basis. The additional channel shall not be used for any purpose other than to continue programming additional government, education, or public access television.

(2) For the purposes of this section, "locally produced video programming" means programming produced or provided by any local resident, the local entity, or any local public or private agency that provides services to residents of the franchise area; or any transmission of a meeting or proceeding of any local, state, or federal governmental entity.

(e) Any PEG channel provided pursuant to this section that is not utilized by the local entity for at least eight hours per day as measured on a quarterly basis may no longer be made available to the local entity, and may be programmed at the holder's discretion. At the time that the local entity can certify to the holder a schedule for at least eight hours of daily programming, the holder of the state franchise shall restore the channel or channels for the use of the local entity.

(f) The content to be provided over the PEG channel capacity provided pursuant to this section shall be the responsibility of the local entity or its designee receiving the benefit of that capacity, and the holder of a state franchise bears only the responsibility for the transmission of that content, subject to technological restraints.

(g) (1) The local entity shall ensure that all transmissions, content, or programming to be transmitted by a holder of a state franchise are provided or submitted in a manner or form that is compatible with the holder's network, if the local entity produces or maintains the PEG programming in that manner or form. If the local entity does not produce or maintain PEG programming in that manner or form, then the local entity may submit or provide PEG programming in a manner or form that is standard in the industry. The holder shall be responsible for any changes in the form of the transmission necessary to make it compatible with the technology or protocol utilized by the holder to deliver services. If the holder is required to change the form of the transmission, the local entity shall permit the holder to do so in a manner that is most economical to the holder.

(2) The provision of those transmissions, content, or programming to the holder of a state franchise shall constitute authorization for the holder to carry those transmissions, content, or programming. The holder may carry the transmission, content, or programming outside of the local entity's jurisdiction if the holder agrees to pay the local entity or its designee any incremental licensing costs incurred by the local entity or its designee associated with that transmission. Local entities shall be prohibited from entering into licensing agreements that impose higher

proportional costs for transmission to subscribers outside the local entity's jurisdiction.

(3) The PEG signal shall be receivable by all subscribers, whether they receive digital or analog service, or a combination thereof, without the need for any equipment other than the equipment necessary to receive the lowest cost tier of service. The PEG access capacity provided shall be of similar quality and functionality to that offered by commercial channels on the lowest cost tier of service unless the signal is provided to the holder at a lower quality or with less functionality.

(h) Where technically feasible, the holder of a state franchise and an incumbent cable operator shall negotiate in good faith to interconnect their networks for the purpose of providing PEG programming. Interconnection may be accomplished by direct cable, microwave link, satellite, or other reasonable method of connection. Holders of a state franchise and incumbent cable operators shall provide interconnection of the PEG channels on reasonable terms and conditions and may not withhold the interconnection. If a holder of a state franchise and an incumbent cable operator cannot reach a mutually acceptable interconnection agreement, the local entity may require the incumbent cable operator to allow the holder to interconnect its network with the incumbent's network at a technically feasible point on the holder's network as identified by the holder. If no technically feasible point for interconnection is available, the holder of a state franchise shall make an interconnection available to the channel originator and shall provide the facilities necessary for the interconnection. The cost of any interconnection shall be borne by the holder requesting the interconnection unless otherwise agreed to by the parties.

(i) A holder of a state franchise shall not be required to interconnect for, or otherwise to transmit, PEG content that is branded with the logo, name, or other identifying marks of another cable operator or video service provider. For purposes of this section, PEG content is not branded if it includes only production credits or other similar information displayed at the conclusion of a program. The local entity may require a cable operator or video service provider to remove its logo, name, or other identifying marks from PEG content that is to be made available through interconnection to another provider of PEG capacity.

(j) In addition to any provision for the PEG channels required under subdivisions (a) to (i), inclusive, the holder shall reserve, designate, and, upon request, activate a channel for carriage of state public affairs programming administered by the state.

(k) All obligations to provide and support PEG channel facilities and institutional networks and to provide cable services to community buildings contained in a locally issued franchise existing on December 31, 2006, shall continue until the local franchise expires, until the term of the franchise would have expired if it had not been terminated pursuant to subdivision (o) of Section 5840, or until January 1, 2009, whichever is later.

(*l*) After January 1, 2007, and until the expiration of the incumbent cable operator's franchise, if the incumbent cable operator has existing unsatisfied obligations under the franchise to remit to the local entity any cash payments for the ongoing costs of public, educational, and government access channel facilities or institutional networks, the local entity shall divide those cash payments among all cable or video providers as provided in this section. The fee shall be the holder's pro rata per subscriber share of the cash payment required to be paid by the incumbent cable operator to the local entity for the costs of PEG channel facilities. All video service providers and the incumbent cable operator shall be subject to the same requirements for recurring payments for the support of PEG channel facilities and institutional networks, whether expressed as a percentage of gross revenue or as an amount per subscriber, per month, or otherwise.

(m) In determining the fee on a pro rata per subscriber basis, all cable and video service providers shall report, for the period in question, to the local entity the total number of subscribers served within the local entity's jurisdiction, which shall be treated as confidential by the local entity and shall be used only to derive the per subscriber fee required by this section. The local entity shall then determine the payment due from each provider based on a per subscriber basis for the period by multiplying the unsatisfied cash payments for the ongoing capital costs of PEG channel facilities by a ratio of the reported subscribers of each provider to the total subscribers within the local entity as of the end of the period. The local entity shall notify the respective providers, in writing, of the resulting pro rata amount. After the notice, any fees required by this section shall be remitted to the applicable local entity quarterly, within 45 days after the end of the quarter for the preceding calendar quarter, and may only be used by the local entity as authorized under federal law.

(n) A local entity may, by ordinance, establish a fee to support PEG channel facilities consistent with federal law that would become effective subsequent to the expiration of any fee imposed pursuant to paragraph (2) of subdivision (*l*). If no such fee exists, the local entity may establish the fee at any time. The fee shall not exceed 1 percent of the holder's gross revenues, as defined in Section 5860. Notwithstanding this limitation, if, on December 31, 2006, a local entity is imposing a separate fee to support PEG channel facilities that is in excess of 1 percent, that entity may, by ordinance, establish a fee no greater than that separate fee, and in no event greater than 3 percent, to support PEG activities. The ordinance shall expire, and may be reauthorized, upon the expiration of the state franchise.

(o) The holder of a state franchise may recover the amount of any fee remitted to a local entity under this section by billing a recovery fee as a separate line item on the regular bill of each subscriber.

(p) A court of competent jurisdiction shall have exclusive jurisdiction to enforce any requirement under this section or resolve any dispute regarding the requirements set forth in this section, and no provider may

by barred from the provision of service or be required to terminate service as a result of that dispute or enforcement action.

5880. Holders of state franchises shall comply with the Emergency Alert System requirements of the Federal Communications Commission in order that emergency messages may be distributed over the holder's network. Any provision in a locally issued franchise authorizing local entities to provide local emergency notifications shall remain in effect, and shall apply to all holders of a state-issued franchise in the same local area, for the duration of the locally issued franchise, until the term of the franchise would have expired were the franchise not terminated pursuant to subdivision (m) of Section 5840, or until January 1, 2009, whichever is later.

5885. (a) The local entity shall allow the holder of a state franchise under this division to install, construct, and maintain a network within public rights-of-way under the same time, place, and manner as the provisions governing telephone corporations under applicable state and federal law, including, but not limited to, the provisions of Section 7901.1.

(b) Nothing in this division shall be construed to change existing law regarding the permitting process or compliance with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) for projects by a holder of a state franchise.

(c) (1) For purposes of this section, an "encroachment permit" means any permit issued by a local entity relating to construction or operation of facilities pursuant to this division.

(2) A local entity shall either approve or deny an application from a holder of a state franchise for an encroachment permit within 60 days of receiving a completed application. An application for an encroachment permit is complete when the applicant has complied with all statutory requirements, including the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(3) If the local entity denies an application for an encroachment permit, it shall, at the time of notifying the applicant of the denial, furnish to the applicant a detailed explanation of the reason for the denial.

(4) The local entity shall adopt regulations prescribing procedures for an applicant to appeal the denial of an encroachment permit application issued by a department of the local entity to the governing body of the local entity.

(5) Nothing in this section precludes an applicant and a local entity from mutually agreeing to an extension of any time limit provided by this section.

(d) A local entity may not enforce against the holder of a state franchise any rule, regulation, or ordinance that purports to allow the local entity to purchase or force the sale of a network.

5890. (a) A cable operator or video service provider that has been granted a state franchise under this division may not discriminate against

or deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides.

(b) Holders or their affiliates with more than 1,000,000 telephone customers in California satisfy subdivision (a) if all of the following conditions are met:

(1) Within three years after it begins providing video service under this division, at least 25 percent of households with access to the holder's video service are low-income households.

(2) Within five years after it begins providing video service under this division and continuing thereafter, at least 30 percent of the households with access to the holder's video service are low-income households.

(3) Holders provide service to community centers in underserved areas, as determined by the holder, without charge, at a ratio of one community center for every 10,000 video customers. The holder shall not be required to take its facilities beyond the appropriate demarcation point outside the community center building or perform any inside wiring. The community center may not receive service from more than one state franchise holder at a time under this section. For purposes of this section, "community center" means any facility ran by an organization that has qualified for the California Teleconnect Fund, as established in Section 280 and that will make the holder's service available to the community.

(c) Holders or their affiliates with fewer than 1,000,000 telephone customers in California satisfy this section if they offer video service to all customers within their telephone service area within a reasonable time, as determined by the commission. However, the commission shall not require the holder to offer video service when the cost to provide video service is substantially above the average cost of providing video service in that telephone service area.

(d) When a holder provides video service outside of its telephone service area, is not a telephone corporation, or offers video service in an area where no other video service is being offered, other than direct-to-home satellite service, there is a rebuttable presumption that discrimination in providing service has not occurred within those areas. The commission may review the holder's proposed video service area to ensure that the area is not drawn in a discriminatory manner.

(e) For holders or their affiliates with more than 1,000,000 telephone customers in California, either of the following shall apply:

(1) If the holder is predominantly deploying fiber optic facilities to the customer's premise, the holder shall provide access to its video service to a number of households at least equal to 25 percent of the customer households in the holder's telephone service area within two years after it begins providing video service under this division, and to a number at least equal to 40 percent of those households within five years.

(2) If the holder is not predominantly deploying fiber optic facilities to the customer's premises, the holder shall provide access to its video service to a number of households at least equal to 35 percent of the

households in the holder's telephone service area within three years after it begins providing video service under this division, and to a number at least equal to 50 percent of these households within five years.

(3) A holder shall not be required to meet the 40-percent requirement in paragraph (1) or the 50-percent requirement in paragraph (2) until two years after at least 30 percent of the households with access to the holder's video service subscribe to it for six consecutive months.

(4) If 30 percent of the households with access to the holder's video service have not subscribed to the holder's video service for six consecutive months within three years after it begins providing video service, the holder may submit validating documentation to the commission. If the commission finds that the documentation validates the holder's claim, then the commission shall permit a delay in meeting the 40-percent requirement in paragraph (1) or the 50-percent requirement in paragraph (2) until the time that the holder does provide service to 30 percent of the households for six consecutive months.

(f) (1) After two years of providing service under this division, the holder may apply to the state franchising authority for an extension to meet the requirements of subdivision (b), (c), or (e). Notice of this application shall also be provided to the telephone customers of the holder, the Secretary of the Senate, and the Chief Clerk of the Assembly.

(2) Upon application, the franchising authority shall hold public hearings in the telephone service area of the applicant.

(3) In reviewing the failure to satisfy the obligations contained in subdivision (b), (c), or (e), the franchising authority shall consider factors that are beyond the control of the holder, including, but not limited to, the following:

(i) The ability of the holder to obtain access to rights-of-way under reasonable terms and conditions.

(ii) The degree to which developments or buildings are not subject to competition because of existing exclusive arrangements.

(iii) The degree to which developments or buildings are inaccessible using reasonable technical solutions under commercially reasonable terms and conditions.

(iv) Natural disasters.

(4) The franchising authority may grant the extension only if the holder has made substantial and continuous effort to meet the requirements of subdivision (b), (c), or (e). If an extension is granted the franchising authority shall establish a new compliance deadline.

(g) Local governments may bring complaints to the state franchising authority that a holder is not offering video service as required by this section, or the state franchising authority may open an investigation on its own motion. The state franchising authority shall hold public hearings before issuing a decision. The commission may suspend or revoke the franchise if the holder fails to comply with the provisions of this division.

(h) If the state franchising authority finds that the holder is in violation of this section, it may, in addition to any other remedies provided by law,

impose a fine not to exceed 1 percent of the holder's total monthly gross revenue received from provision of video service in the state each month from the date of the decision until the date that compliance is achieved.

(i) If a court finds that the holder of the state franchise is in violation of this section, the court may immediately terminate the holder's state franchise, and the court shall, in addition to any other remedies provided by law, impose a fine not to exceed 1 percent of the holder's total gross revenue of its entire cable and service footprint in the state in the full calendar month immediately prior to the decision.

(j) As used in this section, the following definitions shall apply:

(1) "Household" means consistent with the United States Census Bureau, as a house, an apartment, a mobile home, a group of rooms, or a single room that is intended for occupancy as separate living quarters. Separate living quarters are those in which the occupants live and eat separately from any other persons in the building and which have direct access from the outside of the building or through a common hall.

(2) "Low income household" means those residential households located within the holder's existing telephone service area where the average annual household income is less than $35,000 based on the United States Census Bureau estimates adjusted annually to reflect rates of change and distribution through January 1, 2007.

(3) "Customer's household" means those residential households located within the holder's existing telephone service area that are customers of the service by which that telephone service area is defined.

(4) "Access" means that the holder is capable of providing video service at the household address using any technology, other than direct-to-home satellite service, providing two-way broadband Internet capability and video programming, content, and functionality, regardless of whether any customer has ordered service or whether the owner or landlord or other responsible person has granted access to the household. If more than one technology is utilized, the technologies shall provide similar two-way broadband Internet accessibility and similar video programming.

(k) Nothing in this section shall be construed to require a holder to provide video service outside its wireline footprint or to match the existing cable franchise territory of any cable provider.

5900. (a) The holder of a state franchise shall comply with the provisions of Sections 53055, 53055.1, 53055.2, and 53088.2 of the Government Code, and any other customer service standards pertaining to the provision of video service established by federal law or regulation or adopted by subsequent enactment of the Legislature. All customer service and consumer protection standards under this section shall be interpreted and applied to accommodate newer or different technologies while meeting or exceeding the goals of the standards.

(b) The holder of a state franchise shall comply with provisions of Section 637.5 of the Penal Code and the privacy standards contained in Section 631 of the federal Cable Act (47 U.S.C. Sec. 551 et. seq.).

(c) The local entity shall enforce all of the customer service and protection standards of this section with respect to complaints received from residents within the local entity's jurisdiction, but it may not adopt or seek to enforce any additional or different customer service or other performance standards under Section 53055.3 or subdivision (q), (r), or (s) of Section 53088.2 of the Government Code, or any other authority or provision of law.

(d) The local entity shall, by ordinance or resolution, provide a schedule of penalties for any material breach by a holder of a state franchise of this section. No monetary penalties shall be assessed for a material breach if it is out of the reasonable control of the holder. Further, no monetary penalties may be imposed prior to January 1, 2007. Any schedule of monetary penalties adopted pursuant to this section shall in no event exceed five hundred dollars ($500) for each day of each material breach, not to exceed one thousand five hundred dollars ($1,500) for each occurrence of a material breach. However, if a material breach of this section has occurred, and the local entity has provided notice and a fine or penalty has been assessed, and if a subsequent material breach of the same nature occurs within 12 months, the penalties may be increased by the local entity to a maximum of one thousand dollars ($1,000) for each day of each material breach, not to exceed three thousand dollars ($3,000) for each occurrence of the material breach. If a third or further material breach of the same nature occurs within those same 12 months, and the local entity has provided notice and a fine or penalty has been assessed, the penalties may be increased to a maximum of two thousand five hundred dollars ($2,500) for each day of each material breach, not to exceed seven thousand five hundred dollars ($7,500) for each occurrence of the material breach. With respect to video providers subject to a franchise or license, any monetary penalties assessed under this section shall be reduced dollar-for-dollar to the extent any liquidated damage or penalty provision of a current cable television ordinance, franchise contract, or license agreement imposes a monetary obligation upon a video provider for the same customer service failures, and no other monetary damages may be assessed.

(e) The local entity shall give the video provider written notice of any alleged material breaches of the consumer service standards of this division and allow the video provider at least 30 days from receipt of the notice to remedy the specified material breach.

(f) A material breach for the purposes of assessing penalties shall be deemed to have occurred for each day within the jurisdiction of each local entity, following the expiration of the period specified in subdivision (e), that any material breach has not been remedied by the video provider, irrespective of the number of customers affected.

(g) Any penalty shall be provided to the local entity who shall submit one-half of the penalty to the Digital Divide Account established in Section 280.5.

(h) Any interested person may seek judicial review of a decision of the local entity in a court of appropriate jurisdiction. For this purpose, a court of law shall conduct a de novo review of any issues presented.

(i) This section shall not preclude a party affected by this section from utilizing any judicial remedy available to that party without regard to this section. Actions taken by a local legislative body, including a local franchising authority, pursuant to this section shall not be binding upon a court of law. For this purpose, a court of law shall conduct de novo review of any issues presented.

(j) For purposes of this section, "material breach" means any substantial and repeated failure of a video service provider to comply with service quality and other standards specified in subdivision (a).

(k) The Division of Ratepayer Advocates shall have authority to advocate on behalf of video customers regarding renewal of a state-issued franchise and enforcement of Sections 5890, 5900, and 5950. For this purpose, the division shall have access to any information in the possession of the commission subject to all restrictions on disclosure of that information that are applicable to the commission.

5910. (a) The holder of a state franchise shall perform background checks of applicants for employment, according to current business practices.

(b) A background check equivalent to that performed by the holder shall also be conducted on all of the following:

(1) Persons hired by a holder under a personal service contract.

(2) Independent contractors and their employees.

(3) Vendors and their employees.

(c) Independent contractors and vendors shall certify that they have obtained the background checks required pursuant to subdivision (f), and shall make the background checks available to the holder upon request.

(d) Except as otherwise provided by contract, the holder of a state franchise shall not be responsible for administering the background checks and shall not assume the costs of the background checks of individuals who are not applicants for employment of the holder.

(e) (1) Subdivision (a) only applies to applicants for employment for positions that would allow the applicant to have direct contact with or access to the holder's network, central office, or customer premises, and perform activities that involve the installation, service, or repair of the holder's network or equipment.

(2) Subdivision (b) only applies to persons that have direct contact with or access to the holder's network, central office, or customer premises, and perform activities that involve the installation, service, or repair of the holder's network or equipment.

(f) This section does not apply to temporary workers performing emergency functions to restore the network of a holder to its normal state in the event of a natural disaster or an emergency that threatens or results in the loss of service.

5920. (a) A holder of a state franchise employing more than 750 total employees in California shall annually report to the commission all of the following:

(1) The number of California residents employed by the holder, calculated on a full-time or full-time equivalent basis.

(2) The percentage of the holder's total domestic workforce, calculated on a full-time or full-time equivalent basis.

(3) The types and numbers of jobs by occupational classification held by residents of California employed by holders of state franchises and the average pay and benefits of those jobs and, separately, the number of out-of-state residents employed by independent contractors, companies, and consultants hired by the holder, calculated on a full-time or full-time equivalent basis, when the holder is not contractually prohibited from disclosing the information to the public. This paragraph applies only to those employees of an independent contractor, company, or consultant that are personally providing services to the holder, and does not apply to employees of an independent contractor, company, or consultant not personally performing services for the holder.

(4) The number of net new positions proposed to be created directly by the holder of a state franchise during the upcoming year by occupational classifications and by category of full-time, part-time, temporary, and contract employees.

(b) The commission shall annually report the information required to be reported by holders of state franchises pursuant to subdivision (a), to the Assembly Committee on Utilities and Commerce and the Senate Committee on Energy, Utilities and Communications, or their successor committees, and within a reasonable time thereafter, shall make the information available to the public on its Internet Web site.

5930. (a) Notwithstanding any other provision of this division, any video service provider that currently holds a franchise with a local franchising entity in a county that is a party, either alone or in conjunction with any other local franchising entity located in that county, to a stipulation and consent judgment executed by the parties thereto and approved by a federal district court shall neither be entitled to seek a state franchise in any area of that county, including any unincorporated area and any incorporated city of that county, nor abrogate any existing franchise before July 1, 2014. Prior to July 1, 2014, the video service provider shall continue to be exclusively governed by any existing franchise with a local franchising entity for the term of that franchise and any and all issues relating to renewal, transfer, or otherwise in relation to that franchise shall be resolved pursuant to that existing franchise and otherwise applicable federal and local law. This subdivision shall not be deemed to extend any existing franchise beyond its term.

(b) When an incumbent cable operator is providing service under an expired franchise or a franchise that expires before January 2, 2008, the local entity may extend that franchise on the same terms and conditions

through January 2, 2008. A state franchise issued to any incumbent cable operator shall not become operative prior to January 2, 2008.

(c) When a video service provider that holds a state franchise provides the notice required pursuant to subdivision (m) of Section 5840 to a local entity, the local franchising entity may require all incumbent cable operators to seek a state franchise and shall terminate the franchise issued by the local franchising entity when the commission issues a state franchise for the video service provider that includes the entire service area served by the video service provider and the video service provider notifies the local entity that it will begin providing video service in that area under a state franchise.

5940. The holder of a state franchise under this division who also provides stand-alone, residential, primary line, basic telephone service shall not increase this rate to finance the cost of deploying a network to provide video service.

5950. The commission shall not permit a telephone corporation that is providing video service directly or through its affiliates pursuant to a state-issued franchise as an incumbent local exchange carrier to increase rates for residential, primary line, basic telephone service above the rate as of July 1, 2006, until January 1, 2009, unless that telephone corporation is regulated under rate of return regulation. However, the commission may allow rate increases to reflect increases in inflation as shown in the Consumer Price Index published by the Bureau of Labor Statistics. This section does not affect the authority of the commission to authorize an increase in rates for basic telephone service that is bundled with other services and priced as a bundle. Nothing in this section is intended to prohibit implementation of commission decision D. 06-04-071 to the extent it has not been implemented prior to July 1, 2006.

5960. (a) For purposes of this section, “census tract” has the same meaning as used by the United States Census Bureau, and “household” has the same meaning as specified in Section 5890.

(b) Every holder, no later than April 1, 2008, and annually no later than April 1 thereafter, shall report to the commission on a census tract basis the following information:

(1) Broadband Information:

(A) The number of households to which the holder makes broadband available in this state. If the holder does not maintain this information on a census tract basis in its normal course of business, the holder may reasonably approximate the number of households based on information it keeps in the normal course of business.

(B) The number of households that subscribe to broadband that the holder makes available in this state.

(C) Whether the broadband provided by the holder utilizes wireline-based facilities or another technology.

(2) Video Information:

(A) If the holder is a telephone corporation:

(i) The number of households in the holder’s telephone service area.

(ii) The number of households in the holder's telephone service area that are offered video service by the holder.

(B) If the holder is not a telephone corporation:

(i) The number of households in the holder's video service area.

(ii) The number of households in the holder's video service area that are offered video service by the holder.

(3) Low-Income Household Information:

(i) The number of low-income households in the holder's video service area.

(ii) The number of low-income households in the holder's video service area that are offered video service by the holder.

(c) The commission, no later than July 1, 2008, and annually no later than July 1 thereafter, shall submit to the Governor and the Legislature a report that includes based on year-end data, on an aggregated basis, the information submitted by holders pursuant to subdivision (b).

(d) All information submitted to the commission and reported by the commission pursuant to this section shall be disclosed to the public only as provided for pursuant to Section 583. No individually identifiable customer information shall be subject to public disclosure.

5970. Subject to the requirements of this division, a state franchise may be transferred to any successor in interest of the holder to which the certificate originally is granted, whether this transfer is by merger, sale, assignment, bankruptcy, restructuring, or any other type of transaction, provided that the following conditions are met:

(a) The transferee submits to the commission all of the information required by this division of an applicant.

(b) The transferee agrees that any collective bargaining agreement entered into by a video service provider shall continue to be honored, paid, or performed to the same extent as would be required if the video service provider continued to operate under its franchise for the duration of that franchise unless the duration of that agreement is limited by its terms or by federal or state law.

SEC. 4. Section 107.7 of the Revenue and Taxation Code is amended to read:

107.7. (a) When valuing possessory interests in real property created by the right to place wires, conduits, and appurtenances along or across public streets, rights-of-way, or public easements contained in either a cable franchise or license granted pursuant to Section 53066 of the Government Code (a "cable possessory interest") or a state franchise to provide video service pursuant to Section 5840 of the Public Utilities Code (a "video possessory interest"), the assessor shall value these possessory interests consistent with the requirements of Section 401. The methods of valuation shall include, but not be limited to, the comparable sales method, the income method (including, but not limited to, capitalizing rent), or the cost method.

(b) (1) The preferred method of valuation of a cable television possessory interest or video service possessory interest by the assessor is capitalizing the annual rent, using an appropriate capitalization rate.

(2) For purposes of this section, the annual rent shall be that portion of that franchise fee received that is determined to be payment for the cable television possessory interest or video service possessory interest for the actual remaining term or the reasonably anticipated term of the franchise or license or the appropriate economic rent. If the assessor does not use a portion of the franchise fee as the economic rent, the resulting assessments shall not benefit from any presumption of correctness.

(c) If the comparable sales method, which is not the preferred method, is used by the assessor to value a cable possessory interest or video service possessory interest when sold in combination with other property including, but not limited to, intangible assets or rights, the resulting assessments shall not benefit from any presumption of correctness.

(d) Intangible assets or rights of a cable system or the provider of video services are not subject to ad valorem property taxation. These intangible assets or rights, include, but are not limited to: franchises or licenses to construct, operate, and maintain a cable system or video service system for a specified franchise term (excepting therefrom that portion of the franchise or license which grants the possessory interest), subscribers, marketing, and programming contracts, nonreal property lease agreements, management and operating systems, a work force in place, going concern value, deferred, startup, or prematurity costs, covenants not to compete, and goodwill. However, a cable possessory interest or video service possessory interest may be assessed and valued by assuming the presence of intangible assets or rights necessary to put the cable possessory interest or video service possessory interest to beneficial or productive use in an operating cable system or video service system.

(e) Whenever any change in ownership of a cable possessory interest or video service possessory interest occurs, the person or legal entity required to file a statement pursuant to Section 480, 480.1, or 480.2, shall, at the request of the assessor, provide as a part of that statement the following, if applicable: confirmation of the sales price; allocation of the sales price among the counties; and gross revenue and franchise fee expenses of the cable system or video service system by county. Failure to provide this information shall result in a penalty as provided in Section 482, except that the maximum penalty shall be five thousand dollars ($5,000).

SEC. 5. (a) It is the intent of the Legislature that video service providers shall pay as rent a franchise fee to the local entity in which service is being provided for the continued use of streets, public facilities, and other rights-of-way of the local entity in order to provide service.

(b) It is the intent of the Legislature that securing a state franchise by a cable television operator or video service provider pursuant to this act shall not affect the existing requirements governing the valuation of possessory interests as set forth in Section 107.7 of the Revenue and Taxation Code. Furthermore, nothing in this act shall be construed to change the existing

jurisdiction of the State Board of Equalization and county assessors with respect to the assessment of these properties for property tax purposes.

SEC. 6. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because, in that regard, this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

However, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

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ASSEMBLY COMMITTEE SUBSTITUTE FOR

ASSEMBLY, No. 804

STATE OF NEW JERSEY

212th LEGISLATURE

ADOPTED MAY 11, 2006

Sponsored by:
Assemblyman WILFREDO CARABALLO
District 29 (Essex and Union)
Assemblyman JOSEPH VAS
District 19 (Middlesex)
Assemblyman UPENDRA J. CHIVUKULA
District 17 (Middlesex and Somerset)
Assemblyman JOSEPH R. MALONE, III
District 30 (Burlington, Mercer, Monmouth and Ocean)
Assemblyman JEFF VAN DREW
District 1 (Cape May, Atlantic and Cumberland)
Assemblyman THOMAS P. GIBLIN
District 34 (Essex and Passaic)

Co-Sponsored by:
Assemblyman Egan, Assemblywomen Greenstein, Stender, Assemblymen Wisniewski, Epps, Senators Doria, Bucco and Gill

SYNOPSIS

Authorizes a competitive system-wide franchise for certain providers of cable television service.

CURRENT VERSION OF TEXT

Substitute as adopted by the Assembly Telecommunications and Utilities Committee.

(Sponsorship Updated As Of: 6/20/2006)

AN ACT concerning the regulation of cable television service, amending and supplementing P.L.1972, c.186 (C.48:5A-1 et seq.) and amending P.L.1985, c.356, P.L.1991, c.412, and P.L.2003, c.38.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 2 of P.L.1972, c.186 (C.48:5A-2) is amended to read as follows:

2. The Legislature finds, determines and declares:

a. That, after careful investigation, it appears that the rates, services and operations of cable television companies in this State are affected with a public interest;

b. That it should be, and is hereby declared, the policy of this State to provide fair regulation of cable television companies in the interest of the public;

c. That the objects of such regulation are (1) to promote adequate, economical and efficient cable television service to the citizens and residents of this State, (2) to encourage the optimum development of the educational and community-service potentials of the cable television medium, (3) to provide just and reasonable rates and charges for cable television system services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, (4) to promote and encourage harmony between cable television companies and their subscribers and customers, (5) to protect the interests of the several municipalities of this State in relation to the issuance of municipal consents for the operation of cable television companies within their several jurisdictions, and to secure a desirable degree of uniformity in the practices and operations of cable television companies in those several jurisdictions; and (6) to cooperate with other states and with the Federal Government in promoting and coordinating efforts to regulate cable television companies effectively in the public interest;

d. That to secure such regulation and promote the objectives thereof, authority to regulate cable television companies generally, and their rates, services and operations, in the manner and in accordance with the policies set forth in **[**this act**]** P.L.1972, c.186 (C.48:5A-1 et seq.) (the "act"), shall be vested in the **[**Department**]** Board of Public Utilities;

e. That the Federal Communications Commission (the "FCC") reported in its 2005 assessment of video programming competition that increased competition in the multichannel video programming

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

distributor ("MVPD") market has led to improvements in cable television services, including more channels of video programming and increased service options for consumers, and in the case of facilities-based competition, lower prices for customers;

f. That, as a result of ongoing technological innovations, non-traditional providers of MVPD services such as local telephone common carriers are offering or preparing to offer MVPD services over existing telephone lines or over newly-installed high-speed fiber lines to customers in their local telephone service areas, and such developments have the potential for stimulating additional competition in the MVPD market that should lead to further improvements for MVPD customers;

g. That, in order to afford an equal opportunity for non-traditional MVPD providers such as local telephone common carriers to compete with existing providers, and to ensure that customers receive the benefits of a more competitive MVPD market, it is in the public interest to encourage common carriers to enter the MVPD market by adapting the existing regulatory framework to the changed circumstances brought about by recent technological developments while allowing the State to retain its necessary and appropriate regulatory oversight with regard to consumer protection and customer service elements; and

h. That nothing in this act shall be seen to limit or otherwise reduce the protection afforded to cable television customers, and it is in the public interest to include additional provisions in this act to ensure that customers continue to be provided a high level of consumer protection and customer service in a more competitive MVPD market.

(cf: P.L.1972, c.186, s.2)

2. Section 3 of P.L.1972, c.186 (C.48:5A-3) is amended to read as follows:

3. As used in this act, except as the context may otherwise clearly require or indicate:

a. "Board" means the Board of Public Utilities **[**of this State**]**.

b. "Office" means the Office of Cable Television established by **[**this act**]** the "Cable Television Act," P.L.1972, c.186 (C.48:5A-1 et seq.).

c. "Director" means the Director of the Office of Cable Television.

d. "Cable television system" **[**or**]** , "CATV system" or “cable system” means **[**any facility within this State which is operated or intended to be operated to perform the service of receiving and amplifying the signals broadcast by one or more television stations and redistributing such signals by wire, cable or other device or means for accomplishing such redistribution, to members of the public who subscribe to such service, or distributing through its

facility any television signals, whether broadcast or not; or any part of such facility**]** a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment, that is designed to provide cable television service which includes video programming, without regard to the technology used to deliver such video programming, including Internet protocol technology or any successor technology, and which is provided to multiple subscribers within a community, but such term does not include: (1) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (2) a facility that serves subscribers without using any public right-of-way; (3) a facility of a common carrier which is subject, in whole or in part, to regulation by the board pursuant to Title 48 of the Revised Statutes, except that such facility shall be considered a CATV system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (4) an open video system that has been certified by the Federal Communications Commission as being in compliance with the provisions of Part 76, "Multichannel Video and Cable Television Service," of Title 47 of the Code of Federal Regulations; (5) any facilities of any electric public utility used solely for operating its electric utility systems; or (6) a facility of an electric public utility which is subject, in whole or in part, to regulation by the board pursuant to Title 48 of the Revised Statutes, except that such facility shall be considered a CATV system solely to the extent that such facility is used in the transmission of video programming directly to the subscribers. The term "facility" as used in this subsection **[**includes all real property, antennae, poles, wires, cables, conduits, amplifiers, instruments, appliances, fixtures and other personal property used by a CATV company in providing service to its subscribers and customers**]** is limited to the optical spectrum wavelengths, bandwidth, or other current or future technological capacity used for the transmission of video programming directly to subscribers.

e. "Cable television reception service" means the simultaneous delivery through a CATV system of the signals of television broadcast stations to members of the public subscribing to such service for a fee or other consideration, which service may include additional nonbroadcast signals delivered as a part of the service with no additional charge.

f. **[**"Cable communications system" or "cable communications service" means any communications service other than cable television reception service delivered through the facilities of a CATV system and for which charges in addition to or other than those made for cable television reception service are made or proposed to be made.**]** (Deleted by amendment, P.L. , c.)

(pending before the Legislature as this bill)

g. "Cable television company" or "CATV company" means any person **[**owning, controlling, operating or managing a cable television system, and the term "person" as used herein shall be construed, without limiting the generality thereof, to include specifically any agency or instrumentality of this State or of any of its political subdivisions; but this definition shall not include a telephone, telegraph or electric utility company regulated by the Board of Public Utilities in a case where it merely leases or rents or otherwise provides to a CATV company wires, conduits, cables or pole space used in the redistribution of television signals to or toward subscribers or customers of such CATV company**]** or group of persons (1) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (2) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

h. "Highway" includes every street, road, alley, thoroughfare, way or place of any kind used by the public or open to the use of the public.

i. "Certificate" means a certificate of approval issued**[**, or which may be issued,**]** by the board pursuant to **[**this act**]** P.L.1972, c.186 (C.48:5A-1 et seq.).

j. "Cable television service" **[**includes the definitions of cable television reception service and cable communications service herein, as well as the provision of any other impulse or signal by a cable television company or other service lawfully provided, utilizing the facilities of the system**]**, "CATV service" or "cable service" means (1) the one-way transmission to subscribers of (a) video programming, or (b) other programming service; and (2) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service, regardless of the technology utilized by a cable television company to enable such selection or use.

k. "Basic cable service" means any service tier which includes the retransmission of local television broadcast signals and any public, educational and governmental channels.

l. "Hearing impaired individual" means an individual who, because of injury to, disease of, or defect in the inner, middle or outer ear, or any combination thereof, has suffered a loss of hearing acuity such that the individual cannot receive linguistic information without amplification, dubbing or captions.

m. "In series connection" means a connection where the coaxial service wire entering the residence of a subscriber connects first to a television receiver or monitor, with the television receiver or monitor being connected by coaxial wire to a video cassette recorder or other auxiliary equipment or where the coaxial service

wire connects first to a video cassette recorder or auxiliary equipment, with the equipment being connected to a television receiver or monitor and where no external splitting device is used.

n. "Municipality" means one municipality acting singularly or two or more municipalities acting jointly in the granting of municipal consent for the provision of cable television service in accordance with the provisions of the "Cable Television Act," P.L.1972, c.186 (C.48:5A-1 et seq.) as amended and supplemented.

o. "Open video system" means a facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable television service to multiple subscribers within a municipality and which has been certified by the Federal Communications Commission as being in compliance with Part 76 "Multichannel Video and Cable Television Service" of Title 47 of the Code of Federal Regulations.

p. "Private aggregator" means a duly-organized business or non-profit organization authorized to do business in this State that enters into a contract with two or more municipalities for the purpose of facilitating the joint action of those municipalities in granting municipal consent for the provision of cable television service to those municipalities.

q. "Franchise" means an initial authorization, or renewal thereof, issued by a franchising authority in accordance with the provisions of P.L.1972, c.186 (C.48:5A-1 et seq.), whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement or otherwise, which authorizes the construction or operation of a cable television system.

r. "System-wide franchise" means a competitive franchise issued pursuant to P.L.1972, c.186 (C.48:5A-1 et seq.) which authorizes a CATV company to construct or operate a cable television system in any location within this State in which the CATV company, at the time of the issuance of the system-wide franchise, either has plant or equipment in use for the provision of any consumer video, cable or telecommunications service, including telephone service, or has proposed to place such plant or equipment into use to provide such service.

s. "Local franchising authority" or "franchising authority" means a governmental entity empowered by federal, State, or local law to grant a franchise.

t. "Telecommunications service provider" or "telecommunications provider" means any owner of facilities and equipment located in public rights-of-way used to provide telecommunications services, except that such term does not include aggregators of telecommunications services.

u. "Telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

v. "Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

w. "Other programming service" means information other than video programming that a CATV company makes available to all subscribers generally.

x. "Gross revenues" means all revenues actually received by the holder of a system-wide franchise or certificate of approval derived during the calendar year from all the charges or fees paid by subscribers in the municipality to the CATV company for providing basic cable service, cable programming service, as that term is defined in 47 C.F.R. s.76.901, and premier tier programming service, for pay-per-view events, seasonal or sporting events of limited duration, and for all similar programming or channels, but gross revenues shall not include: (1) amounts not actually received, even if billed, such as bad debt; refunds, rebates or discounts to subscribers or other third parties; or revenue imputed from the provision of cable services for free or at reduced rates to any person as required or allowed by law, including, without limitation, the provision of such services to public institutions, public schools, governmental entities, or employees, other than forgone revenue chosen not to be received in exchange for trades, barters, services, or other items of value; (2) any revenue from any charges or fees derived from services classified as non-cable services under federal law, including, without limitation, revenue derived from telecommunications services and information services and any other revenues attributed by the holder of a certificate of approval or system-wide franchise to non-cable services in accordance with Federal Communications Commission rules, regulations, standards, or orders; (3) amounts billed to and collected from subscribers to recover any tax, fee or surcharge of general applicability imposed by any governmental entity on the holder of a certificate of approval or a system-wide franchise, including without limitation, sales and use taxes, gross receipts taxes, excise taxes, utility users taxes, public service taxes, communication taxes, and any other fee not imposed by section 30 of P.L.1972, c.186 (C.48:5A-30). In the case of cable service that may be bundled or integrated functionally with other services, capabilities or applications, the gross revenues shall only include those charges or fees derived from or attributable to the provision of cable service, as reflected on the books and records of the holder of a certificate of approval or a system-wide franchise, as the case may be, in accordance with the rules, regulations, standards and orders of the Federal Communications Commission.

(cf: P.L.2003, c.38, s.3)

3. Section 4 of P.L.1972, c.186 (C.48:5A-4) is amended to read as follows:

4. There is hereby established in the [Department] Board of Public Utilities an Office of Cable Television; but nothing in [this act] P.L.1972, c.186 (C.48:5A-1 et seq.) shall be construed as declaring or defining cable television to be a public utility or subjecting it to the application of any of the provisions of Title 48 of the Revised Statutes, except as otherwise specifically provided in [this act] P.L.1972, c.186 (C.48:5A-1 et seq.).
(cf: P.L.1972, c.186, s.4)

4. Section 6 of P.L.1972, c.186 (C.48:5A-6) is amended to read as follows:

6. The director under the supervision of the [board] President of the Board shall organize the work of the office and establish therein such administrative subdivisions as [he] may [deem] be deemed necessary, proper and expedient. [He] The director may formulate [and adopt] rules and regulations for the board's consideration and prescribe duties for the efficient conduct of the business, work and general administration of the office. [He] The director may delegate to subordinate officers or employees in the office such [of his] powers as [he] may [deem] be deemed desirable, to be exercised under [his] the supervision and direction of the director.
(cf: P.L.1972, c.186, s.6)

5. Section 7 of P.L.1972, c.186 (C.48:5A-7) is amended to read as follows:

7. Subject to the provisions of Title [11] 11A of the [Revised] New Jersey Statutes, and within the limits of funds appropriated or otherwise made available, the director with the approval of the [board] President of the Board may appoint such officers and employees of the office as [he] may [deem] be deemed necessary for the performance of its duties, and may fix and determine their qualifications, duties and compensation, and may retain or employ engineers and private consultants on a contract basis or otherwise for rendering professional or technical service or assistance.
(cf: P.L.1972, c.186, s.7)

6. Section 9 of P.L.1972, c.186 (C.48:5A-9) is amended to read as follows:

9. The board, which is empowered pursuant to P.L.1972, c.186 (C.48:5A-1 et seq.) to be the local franchising authority in this State, and the director under the supervision of the board, shall have full right, power, authority and jurisdiction to:

a. Receive or initiate complaints of the alleged violation of any of the provisions of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.) or of any of the rules and regulations made pursuant to [this act] P.L.1972, c.186 (C.48:5A-1 et seq.) or of the terms and conditions

of any municipal consent or franchise granted pursuant to [this act] P.L.1972, c.186 (C.48:5A-1 et seq.); and for this purpose and all other purposes necessary to enable [him] the director to administer the duties of the office as prescribed by law may hold hearings and shall have power to [subpena] subpoena witnesses and compel their attendance, administer oaths and require the production for examination of any books or papers relating to any matter under investigation at any such hearing;

b. Supervise and regulate every CATV company operating within this State and its property, property rights, equipment, facilities, contracts, certificates and franchises so far as may be necessary to carry out the purposes of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.), and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction;

c. Institute all proceedings and investigations, hear all complaints, issue all process and orders, and render all decisions necessary to enforce the provisions of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.), of the rules and regulations adopted thereunder, or of any municipal consents issued pursuant to [this act] P.L.1972, c.186 (C.48:5A-1 et seq.);

d. Institute, or intervene as a party in, any action in any court of competent jurisdiction seeking mandamus, injunctive or other relief to compel compliance with any provision of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.), of any rule, regulation or order adopted thereunder or of any municipal consent or franchise issued thereunder, or to restrain or otherwise prevent or prohibit any illegal or unauthorized conduct in connection therewith.

(cf: P.L.1972, c.186, s.9)

7. Section 10 of P.L.1972, c.186 (C.48:5A-10) is amended to read as follows:

10. The director with the approval of the board shall establish, consistent with federal law, for the purpose of assuring safe, adequate and proper cable television service, after hearing in accordance with the "Administrative Procedure Act," [(] P.L.1968, c.410 [;] (C.52:14B-1 et seq.), rules and regulations governing:

a. Technical standards of performance for CATV systems and the equipment and facilities thereof, including standards of maintenance and safety, not inconsistent with applicable Federal regulations [.] ;

b. The prohibition and prevention of the imposition of any unjust or unreasonable, unjustly discriminatory or unduly preferential individual or joint rate, charge or schedule for any service supplied or rendered by a CATV company within this State, or the adoption or imposition of any unjust or unreasonable classification in the making or as the basis of any individual or joint

rate, charge or schedule for any service rendered by a CATV company within this State [.] ;

c. Requirements for the reasonably prompt and complete exercise of the rights conferred by any certificate, subject to revocation thereof or other penalty provided under [this act] P.L.1972, c.186 (C.48:5A-1 et seq.);

d. Procedures and forms for the application by a CATV company for municipal consents or for a franchise required under [this act] P.L.1972, c.186 (C.48:5A-1 et seq.);

e. Procedures and forms for review by the director of municipal consents or franchises issued pursuant to the provisions of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.);

f. Procedures and forms for the application by CATV companies to municipalities for amendment of rates or other terms and conditions of municipal consents or franchises and, for the review by the director of the terms of such amendments, and for the resolution by the director of disputes between municipalities and CATV companies over such applications;

g. Procedures and forms for submission to and resolution by the director of complaints or disputes by or between CATV companies, municipalities or citizens regarding proper compliance with the implementation of the provisions of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.) or the rules and regulations made or municipal consents or franchises issued pursuant to [this act] P.L.1972, c.186 (C.48:5A-1 et seq.); provided, however, that, notwithstanding the foregoing provisions of this section or any of the provisions of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.), it is the intent of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.) that all the provisions, regulations and requirements imposed by or pursuant to [this act] P.L.1972, c.186 (C.48:5A-1 et seq.) shall be operative only to the extent that the same are not in conflict with the laws of the United States or with any rules, regulations or orders adopted, issued or promulgated pursuant thereto by any Federal regulatory body having jurisdiction. No requirement, regulation, term, condition, limitation or provision imposed by or pursuant to [this act] P.L.1972, c.186 (C.48:5A-1 et seq.) which is contrary to or inconsistent with any such Federal law, regulation or order now or hereafter adopted shall be enforced by the director or shall be authority for the granting, denial, amendment or limitation of any municipal consent or certificate of approval which may be applied for or issued under the terms of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.).

The board through the office is hereby empowered and directed to cooperate with any Federal regulatory agency in the enforcement within this State of all Federal laws, rules, regulations and orders relating to CATV systems and CATV companies, and therein to act

as agent for such Federal regulatory body to the extent authorized by or pursuant to Federal law, and to enter into agreements for said purpose.
(cf: P.L.1972, c.186, s.10)

8. Section 11 of P.L.1972, c.186 (C.48:5A-11) is amended to read as follows:

11. a. [Except as provided in subsection g. of section 28 of this act with respect to rates to subscribers to cable television reception service, the] The board through the office shall, consistent with federal law, prescribe just and reasonable rates, charges and classifications for the services rendered by a CATV company, and the tariffs therefor shall be filed and published in such manner and on such notice as the director with the approval of the board may prescribe, and shall be subject to change on such notice and in such manner as the director with the approval of the board may prescribe.

b. The board shall from time to time cause the established rates and rate schedules of each CATV company for cable TV reception service to be reviewed, and if upon such review it shall appear to the board that, under federal law, such rates, or any of them, are or may be excessive, unreasonable, unjustly discriminatory or unduly preferential, the board shall require the CATV company to establish to its satisfaction that such rates are just, reasonable and not excessive or unjustly preferential or discriminatory, and for such purpose shall order the director to hold a hearing thereon. After a hearing upon notice and full opportunity to be heard afforded to the CATV company, the director may recommend amendment of the schedule of cable television subscription rates charged by such company, and such amended schedule if approved by the board shall supersede and replace the schedule so amended.

c. Any hearing held pursuant to this section shall be open to the public, and notice thereof shall be published by the [director] cable television company at least 10 days prior thereto in a newspaper or newspapers of general circulation [in each municipality comprised, in whole or part,] in the certificated area wherein the rate schedule which is the subject of the hearing applies. Every municipality may intervene in any hearing held by the director pursuant to this section affecting the municipality or the public within the municipality.

d. No CATV company shall derive from the operations of cable television reception service or cable communications systems any revenues other than the fees, charges, rates and tariffs provided for in subsection a. of this section and in subsection g. of section 28 of this act.

e. Whenever pursuant to the provisions of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.) the board or the director is required to determine whether any of the rates, charges, fees, tariffs and

classifications of a CATV company [subject to this section or to subsection g. of section 28 of this act] are unjust, unreasonable, discriminatory or unduly preferential, there shall be taken into consideration any fees which are charged for the use of a CATV system, or part thereof, as an advertising medium, or for services ancillary to such use, and from which the CATV system derives revenue, directly or indirectly, and the effect thereof upon, the company's requirements for revenue from such fees, rates, charges, tariffs and classifications subject to the provisions of this section.

f. The provisions of this section shall not apply in any area where there is effective competition as that term is used in 47 U.S.C. s.543.

(cf: P.L.1972, c.186, s.11)

9. Section 2 of P.L.1985, c.356 (C.48:5A-11.2) is amended to read as follows:

2. Notwithstanding the provisions of P.L.1972, c.186 (C.48:5A-1 et seq.) or of any other State law to the contrary, any CATV company providing service may establish rates or schedules which provide for a reduction or discount in rates for cable television reception service for senior citizens [and], disabled citizens, or other economically disadvantaged citizens who meet the eligibility requirements of either the "Pharmaceutical Assistance to the Aged and Disabled" program pursuant to P.L.1975, c.194 (C.30:4D-20 et seq.), as amended and supplemented; or are receiving or are eligible to receive benefits under the Supplemental Security Income program, as defined in section 1 of P.L.1973, c.256 (C.44:7-85); or are receiving disability insurance benefits under Title II of the federal Social Security Act, 42 U.S.C. s.401 et seq., and meet the income and residency requirements of the "Pharmaceutical Assistance to the Aged and Disabled Program," established pursuant to P.L.1975, c.194 (C.30:4D-20 et seq.).

The Board of Public Utilities through the Office of Cable Television shall adopt regulations for the prompt, fair and efficient establishment and maintenance of these reduced or discounted rates and schedules. Subscription to the "Tenants' Lifeline Assistance Program," established pursuant to P.L.1981, c.210 (C.48:2-29.30 et seq.), or to the "Lifeline Credit Program," established pursuant to P.L.1979, c.197 (C.48:2-29.15 et seq.), shall not be a basis for exclusion from any reduction or discount provided under this section, nor shall subscription to any cable television service from such provider be a basis for exclusion from the Tenants' Lifeline Assistance Program or the Lifeline Credit Program.

"Senior citizen" means any person 62 years of age or older who subscribes for CATV service and who does not share the subscription with more than one other person in the same dwelling

unit who is less than 62 years of age.
(cf: P.L.1988, c.81, s.2)

10. Section 3 of P.L.1985, c.356 (C.48:5A-11.3) is amended to read as follows:

3. ⟦A municipality shall not require⟧ A cable television company shall not be required, as part of any franchising agreement, or renewal thereof, or as part of any negotiations leading up to a franchising agreement, or renewal thereof, ⟦that a CATV company⟧ or pursuant to order, rule or regulation of the office or the board, to provide the reduction or discount in rates which is permitted under section 2 of ⟦this act⟧ P.L.1985, c.356 (C.48:5A-11.2).
(cf: P.L.1985, c.356, s.3)

11. Section 15 of P.L.1972, c.186 (C.48:5A-15) is amended to read as follows:

15. No person shall hereafter begin the construction ⟦,⟧ or extension of a CATV system, or begin the operation of a CATV system, or acquire ownership or control thereof, without first obtaining from the board a certificate of approval or franchise issued in accordance with the provisions and procedures specified in ⟦this act⟧ P.L.1972, c.186 (C.48:5A-1 et seq.); except that the director may, by order, rule or regulation, exempt a CATV company from the above ⟦certificate⟧ requirement in a case ⟦where its⟧ in which the CATV company's temporary acts or operations do not require the issuance of a certificate of approval or a system-wide franchise in the public interest. The issuance of a certificate of approval or a system-wide franchise by the board to a CATV company shall be deemed to confer a franchise upon the CATV company. A telecommunications service provider holding authority, granted prior to the enactment of P.L. , c. (C.) (pending before the Legislature as this bill), to utilize the public rights-of-way to construct, upgrade, operate or maintain a communications network shall not be required to obtain a certificate of authority, system-wide franchise or any other authorization, except for being subject to generally applicable non-discriminatory permit requirements, to construct, upgrade, operate or maintain a communications network capable of providing cable service, and a certificate of authority or a system-wide franchise shall be required only prior to the actual provision of cable service on a commercial basis to the general public.
(cf: P.L.1972, c.186, s.15)

12. Section 16 of P.L.1972, c.186 (C.48:5A-16) is amended to read as follows:

16. a. Any entity that seeks to provide cable service in this State

after the effective date of P.L. , c. (C.) (pending before the Legislature as this bill) may apply for either individual certificates of approval or a system-wide franchise. The application for **[**such**]** a certificate of approval or a system-wide franchise from the board shall be in writing **[**,**]**.

b. (1) If the application is for an individual certificate of approval, it shall have attached thereto the municipal consents required under section 22 of **[**this act**]** P.L.1972, c.186 (C.48:5A-22), except that a CATV company which is authorized under section 25 of **[**this act**]** P.L.1972, c.186 (C.48:5A-25) to continue operations after the expiration of a municipal consent and pending municipal action upon application made for renewal or reissuance of such consent may in lieu of such municipal consent attach to its application a statement regarding its authorization to continue operations under the provisions of section 25 of P.L.1972, c.186 (C.48:5A-25); and shall contain such other information as the director may from time to time prescribe by duly promulgated rule, regulation or order. Each such application shall be accompanied by a filing fee of **[**$100.00**]** $200.

[b.**]** (2). Upon receipt of **[**such**]** an application for a certificate of approval, the board shall review the **[**same**]** application and shall, within 30 days of the receipt thereof, either issue the certificate of approval applied for or order the director to schedule a hearing upon the application. No application shall be denied without a hearing thereon. In determining whether a certificate of approval should **[**issue**]** be issued, the board shall consider **[**, in addition to**]** only the requirements of **[**section 17, among other things, public convenience and necessity, the suitability and character of the applicant, the financial responsibility of the applicant, and the ability of the applicant to perform efficiently the proposed service and other service which may be required by public convenience and necessity during the term of the municipal consent. Upon receipt of a complaint from any person claiming to be aggrieved by the issuance of a certificate applied for, the board shall not issue such certificate without a hearing thereon, if it deems that there is a reasonable ground for such complaint**]** sections 17 and 28 of P.L.1972, c.186 (C.48:5A-17: C.48:5A-28).

c. **[**If in its initial review of the application it shall appear to the board that any of the rates in the schedule of rates provided therein pursuant to subsection g. of section 28 of this act are or may be excessive, unreasonable, unjustly discriminatory or unduly preferential, it shall not issue a certificate without a hearing on such application, to be held by the director at the order of the board at which hearing the applicant CATV company may be required to establish to his satisfaction that such rates are just, reasonable and not excessive or unjustly preferential or discriminatory. After a hearing at which such justification of rates is required, upon notice

and full opportunity to be heard afforded to the applicant CATV company, the director may, recommended that the schedule of rates aforesaid be amended and such amended schedule if approved by the board shall supersede and replace the schedule so amended.**]** (Deleted by amendment, P.L. , c.) (pending before the Legislature as this bill)

d. If the application is for a system-wide franchise, it shall be accompanied by a filing fee of $1,000, and shall specify the information required in section 28 of P.L.1972, c.186 (C.48:5A-28).

[d.**]** e. A hearing held pursuant to subsection b. of this section shall be held not later than the sixtieth day following the date of receipt of the application; it may be adjourned from time to time, but not to a date later than the sixtieth day following the date on which it commenced, except with the consent of the applicant. If such hearing is held, the director shall within 60 days after the conclusion thereof, transmit his findings of fact and recommendations to the board, which shall either issue or deny the certificate for which application was made, or may issue a certificate with such limitations and conditions as the public interest may require. The board shall transmit notice of its decision to the applicant.

f. Upon receipt of an application for a system-wide franchise submitted pursuant to subsection a. of this section, the board shall review the application and shall, within 45 days of the receipt thereof, schedule two public hearings to be held in different geographical areas of the State during the 45-day review period to consider the application. In determining whether a system-wide franchise should be issued, the board shall consider only the requirements of sections 17 and 28 of P.L.1972, c.186 (C.48:5A-17: C.48:5A-28). On or before the expiration of the 45-day period, the board shall issue an order in writing approving the application if the applicant has complied with the requirements for a system-wide franchise, or the board shall disapprove the application in writing citing the reasons for disapproval if the board determines that the application for a system-wide franchise does not comply with the requirements for a system-wide franchise. If, during the 45-day review period, the board determines to disapprove the application, the board shall schedule a meeting with the applicant to explain to the applicant the reasons for the board's disapproval and to allow the applicant to question the board concerning the reasons for the board's disapproval. Such meeting shall be scheduled no later than two weeks following the expiration of the 45-day review period required by this subsection. The applicant shall have 30 days following the date of the meeting with the board required by this subsection to file an appeal of the board's decision. The board shall thereafter schedule an administrative hearing not later than the thirtieth day following the date of the filing of the applicant's

appeal in order to consider the applicant's appeal. The board shall issue a final decision in written form on the applicant's appeal not later than the sixtieth day following the administrative hearing, required by this subsection, on the applicant's appeal.
(cf: P.L.1972, c.186, s.16)

13. Section 17 of P.L.1972, c.186 (C.48:5A-17) is amended to read as follows:

17. a. The board shall issue a certificate of approval or a system-wide franchise, as appropriate, when, after reviewing the application, and after [hearing if one is held] the required meeting and hearings have been held pursuant to section 16 of P.L.1972, c.186 (C.48:5A-16), the applicant establishes to [its] the board's satisfaction that the applicant has all the municipal consents necessary to support the application, if such consents are required, and that such consents and the issuance thereof are in conformity with the requirements of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.), and that the applicant has complied or is ready, willing and able to comply with all applicable rules and regulations imposed by or pursuant to State or federal law as preconditions for engaging in [his] the applicant's proposed CATV operations; provided, that in the case of any application for a certificate of approval which has omitted the attachment of municipal consent in the circumstance provided for in subsection a. of section 16 of [this act] P.L.1972, c.186 (C.48:5A-16), the board shall condition the issuance of the certificate upon the applicant's reasonably prompt attainment of the omitted municipal consent or reasonably prompt initiation of proceedings under subsection d. of this section.

b. In considering any [such] application for a certificate of approval, the board shall take into consideration the probable effects upon both the area for which certification is sought and neighboring areas not covered in the municipal consents; and if it finds that the probable effects, for technical and financial reasons, would be to impede the development of adequate cable [television] service, or create an unreasonable duplication of services likely to be detrimental to the development of adequate cable [television] service in any area either within or without the area for which certification is sought, it may deny the certificate or it may amend the certificate in issuing it so as to:

(1) Direct that areas covered in the application be excluded from the area certified; or

(2) Direct that areas not covered in the application be included in the area certified.

c. No such certificate of approval amended pursuant to subsection b. of this section shall be issued except after hearing of which each affected municipality shall be given notice and afforded opportunity to be heard. No such amended certificate of approval

shall be issued which would impair the terms of any existing certificate of approval or of any municipal consent upon which such existing certificate is based, except with the consent of the holder of such existing certificate and of any municipality having issued such municipal consent.

d. If a municipality shall arbitrarily refuse to grant the municipal consent required under the terms of **[**this act**]** P.L.1972, c.186 (C.48:5A-1 et seq.) prerequisite to issuance of a certificate, or to act upon an application for such municipal consent within 90 days after such application is filed, then the applicant **[**CATV company**]** may avoid the necessity of first obtaining such municipal consent by showing to the satisfaction of the board that the municipal consent is being arbitrarily withheld. But any CATV company certificated without municipal consent shall nevertheless pay the franchise tax to the municipality imposed under section 30 of **[**this act**]** P.L.1972, c.186 (C.48:5A-30). An application for certificate filed pursuant to this subsection shall be accompanied by a filing fee of **[**$200.00**]** $1,000.

e. If any municipality or county shall refuse to any CATV company, whether the holder of a municipal consent from that municipality or otherwise, any zoning variance or other municipal act or authorization, or any county act or authorization, necessary to permit such CATV company to locate any facility of such CATV company within such municipality or county, or to install transmission facilities through such municipality or county for the purpose of serving subscribers or customers in any area for which such CATV company has been issued a certificate or system-wide franchise by the board, the CATV company may apply to the board for an order setting aside such municipal or county refusal and permitting such location of facility or installation of transmission facilities as requested by the CATV company. An application pursuant to this subsection shall be accompanied by a filing fee of **[**$200.00**]** $500. The board, after hearing upon notice and full opportunity for both the applicant and the municipality or county to be heard, shall issue such order when it appears to the board's satisfaction that such permission is necessary to enable the CATV company to provide safe, adequate and proper CATV service to its customers or subscribers in the manner required by **[**this act**]** P.L.1972, c.186 (C.48:5A-1 et seq.) and that such location or installation will not adversely affect the public health, safety and welfare.

f. The director shall issue a certificate of approval to any CATV company lawfully engaged in the construction, extension or operation of a CATV system **[**on the effective date of this act**]** within the boundaries of the municipality cited in the application, for the construction, extension or operation then being conducted within such municipality, without further review, if application for

such certificate is filed with the board within 90 days after such effective date. The construction, extension or operation of such a CATV system may be lawfully continued pending the filing of such an application unless the director orders otherwise. An application for such certificate which is untimely shall be determined in accordance with the procedures prescribed in subsections a. through d. of this section. A certificate of approval issued under this subsection shall expire five years from the date of issuance; and no CATV company holding such certificate shall be authorized to continue its operations after such expiration unless prior thereto it shall have obtained a certificate of approval under the procedures specified in subsections a. through d. of this section, except that such a CATV company which has initiated proceedings for certification under subsections a. through d. of this section prior to the expiration of a certificate of approval granted under this subsection may continue its operations pending the final disposition of such proceedings. An application pursuant to this subsection shall be accompanied by a filing fee of [$50.00] $50.
(cf: P.L.1986, c.163, s.1)

14. Section 18 of P.L.1972, c.186 (C.48:5A-18) is amended as follows:

18. a. Any hearing held pursuant to the provisions of section 16 or section 17 of [this act] P.L.1972. c.186 (C.48:5A-16; C.48:5A-17) shall be open to the public, and notice thereof shall be published by the [director] applicant at least 10 days prior thereto in a newspaper or newspapers of general circulation throughout the State or (1) if the hearing is upon application for certification, in each municipality comprised, in whole or part, in the area for which certification is sought, or (2) if the hearing is upon an application under subsection e. of section 17 of P.L.1972, c.186 (C.48:5A-17), in each municipality [comprised in whole or part, in the certificated area or area for which certification is sought, of the CATV system of the applicant CATV company, and also each other municipality] whose refusal of municipal action or authorization is involved in the application.

b. Every municipality may intervene in any hearing or investigation held under the authority of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.) which involves rates, charges, services or facilities affecting the municipality or the public within the municipality.

c. For the purpose of defraying the administrative expenses of hearings held pursuant to section 16 or 17 of [this act] P.L.1972, c.186 (C.48:5A-16; C.48:5A-17), the applicant CATV company shall be required to pay to the Office of Cable Television a fee not in excess of [$50.00] $500 per day of hearing or fraction thereof, according to such fee schedule as the director shall from time to

time adopt by rule. Such fee shall be in addition to any filing fee imposed pursuant to sections [17] 16 and [18] 17 of [this act] P.L.1972, c.186 (C.48:5A-16; C.48:5A-17); the amount shall be due and payable upon presentation of an invoice.

d. All fees and charges collected under the provisions of [section] sections 16 [,] and 17 [or 18] of [this act] P.L.1972, c.186 (C.48:5A-16; C.48:5A-17) shall be received by the director for the sole use of the State, and [he] the director shall report on and return to the State Treasurer all such fees and charges collected [by him].

(cf: P.L.1972, c.186, s.18)

15. Section 19 of P.L.1972, c.186 (C.48:5A-19) is amended to read as follows:

19. a. A certificate of approval issued by the board shall be nontransferable, except by consent of the board[;] and shall specify the area to which it applies and the municipal consents upon which it is based [, and]. A certificate of approval issued by the board shall be valid for 15 years from the date of issuance or 20 years from the date of issuance if the board certifies that a CATV company has implemented an open video system in accordance with 47 U.S.C. s.573 within one year after receiving a municipal consent, or until the expiration, revocation, termination or renegotiation of any municipal consent upon which it is based, whichever is sooner. But amendment of the terms of a municipal consent by mutual consent and in conformity with the procedures specified in [this act] P.L.1972, c.186 (C.48:5A-1 et seq.) during the term for which it was issued shall not require the issuance of a new certificate of approval. A CATV company holding a certificate based upon a municipal consent with a provision for automatic renewal for a term not exceeding 10 years beyond its expiration date or 15 years beyond its expiration date if the board certifies that the CATV company has implemented an open video system in accordance with 47 U.S.C. s.573, shall be entitled to automatic reissuance of a certificate for such term, unless it shall forfeit such entitlement by violation of any terms of [this act] P.L.1972, c.186 (C.48:5A-1 et seq.), regulations issued pursuant thereto, or by the terms of the municipal consent.

b. A system-wide franchise issued by the board shall be nontransferable, except by consent of the board, and shall specify the area to which it applies. A system-wide franchise issued by the board shall be valid for seven years from the date of issuance. A system-wide franchise issued pursuant to P.L.1972, c.186 (C.48:5A-1 et seq.) shall not require: (1) a CATV company to operate outside of the areas in which the CATV company either has plant or equipment in use for the provision of any consumer video, cable or telecommunications service, or has proposed to place into use such

plant or equipment for the provision of such services; or (2) a CATV company with municipal consents issued prior to the effective date of P.L. , c. (C.) (pending before the Legislature as this bill) to operate outside of the areas covered by such consents. Renewal of a system-wide franchise shall be valid for a period of seven years from the date of the renewal issuance, and the board shall establish rules governing the renewal of a system-wide franchise.

(cf: P.L.2003, c.38, s.4)

16. Section 20 of P.L.1972, c.186 (C.48:5A-20) is amended to read as follows:

20. a. Upon obtaining the prior approval of the board, if necessary, a CATV company may construct and maintain the wires, cables, and conduits necessary to its business upon, under or over any highway, and may erect and maintain the necessary fixtures, including poles and posts, for sustaining such wires and cables; provided, however, that such wires, cables and fixtures shall be so placed or constructed as not to unreasonably inconvenience public travel on the highway or the use thereof by public utilities or other persons or organizations having rights therein. This subsection shall not apply to a telecommunications service provider deploying telecommunications facilities that can be used as shared-use facilities to carry cable television service at a later date.

b. Whenever the [Board] board shall find that public convenience and necessity require the use by a CATV company or a public utility of the wires, cables, conduits, poles or other equipment, or any part thereof, on, over or under any highway or any right-of-way and belonging to another CATV company or public utility, and that such use will not result in injury to the owner or other users of such equipment or any right-of-way or in any substantial detriment to the service, and that such CATV companies or public utilities have failed to agree upon such use or the terms and conditions or compensation for the same, the [office] board may order that such use be permitted and prescribe a reasonable compensation and reasonable terms and conditions for the joint use. If such use is ordered, the CATV company or public utility to which the use is permitted shall be liable to the owner or other users of such equipment for such damage as may result therefrom to the property of such owner or other users thereof.

(cf: P.L.1972, c.186, s.20)

17. Section 7 of P.L.1991, c.412 (C.48:5A-20.1) is amended to read as follows:

7. Within 30 days after the effective date of [this act] P.L. , c. (C.) (pending before the Legislature as this bill), the [Board of Regulatory Commissioners] board shall notify the general

manager of every cable television company that, in order to receive notice by an applicant pursuant to subsection h. of section 7.1 of P.L.1975, c.291 (C.40:55D-12), the cable television company shall register with any municipality in which the cable television company has plant located in a right-of-way or easement.
(cf: P.L.1991, c.412, s.7)

18. Section 21 of P.L.1972, c.186 (C.48:5A-21) is amended to read as follows:

21. Upon the prior approval of the [Board] board, any person may lease or rent or otherwise make available facilities or rights-of-way, including pole space, to a CATV company for the redistribution of television signals to or toward the customers or subscribers of such CATV company. [Any lease, rental or other method of making available such facilities or rights-of-way, including pole space, which is in effect on the effective date of this act and which will be in effect for a period of more than 120 days after the effective date of this act shall be submitted to the board for approval within 120 days after the effective date of this act, and if such lease or rental or other method is disapproved by the board it shall thereupon become void.] The terms and conditions, including rates and charges to the CATV company, imposed by any public utility under any such lease, rental or other method of making available such facilities or rights-of-way, including pole space, to a CATV company shall be subject to the jurisdiction of the [Board of Public Utility Commissioners] board in the same manner and to the same extent that rates and charges of public utilities generally are subject to the board's jurisdiction by virtue of the appropriate provisions of Title 48 of the Revised Statutes.
(cf: P.L.1972, c.186, s.21)

19. (New section) a. Municipal consents and certificates of approval for applications to provide cable television services in a municipality issued prior to the effective date of P.L. , c. (C.) (pending before the Legislature as this bill) shall remain in effect until such time as they may expire or until such time as the cable television company is granted a renewal of the franchise as a municipal franchise or converts the franchise to a system-wide franchise. Except as may otherwise be provided by subsection b. of this section and section 30 of P.L.1972, c.186 (C.48:5A-30), both the municipality and the cable television company shall be bound by the terms of the municipal consents and certificates of approval until such time as the municipal consents and certificates of approval have been converted into a system-wide franchise. A cable television company with a municipal franchise or franchises issued prior to the effective date of P.L. , c. (C.) (pending before the Legislature as this bill) may, if it wishes, automatically

convert any or all such franchise or franchises into a system-wide franchise upon notice to the board and the affected municipality, but without the need for the consent of either the board or the affected municipality and without regard to the requirements of P.L. , c. (C.) (pending before the Legislature as this bill) applicable to applications for such a franchise, except that the commitments required pursuant to subsections h. through n. of section 28 of P.L.1972, c.186 (C.48:5A-28) shall be applicable to any or all such system-wide franchises and any failure of a CATV company to abide by or conform its practices to such commitments shall be considered a violation of the system-wide franchise and the board may enforce these provisions through the imposition of monetary penalties under section 51 of P.L.1972, c.186 (C.48:5A-51), or the suspension or revocation of the system-wide franchise**,** or it may seek to renew such franchise or franchises as a municipal franchise or franchises pursuant to the provisions of P.L.1972, c.186 (C.48:5A-1 et seq.). Such conversion need not take place with respect to all municipalities at the same time, but rather the cable television company may convert additional municipal franchises and add affected municipalities to the service area covered by such system-wide franchise at any time during the term of the system-wide franchise.

b. If a cable television company is granted a system-wide franchise by the board pursuant to the provisions of P.L. , c. (C.) (pending before the Legislature as this bill), the company shall be able thereafter to be issued a municipal franchise or franchises and the renewal of a municipal franchise or franchises which had been issued prior to the effective date of P.L. , c. (C.) (pending before the Legislature as this bill). Nothing herein shall preclude a municipality from enforcing its right-of-way management powers on a reasonable and non-discriminatory basis**,** except that such powers shall not include the authority to impose any fees, taxes, assessments or charges of any nature for the use of public rights-of-way by a CATV company except as expressly provided by P.L. , c. (C.) (pending before the Legislature as this bill). The provisions of this subsection shall not be construed to relieve any cable television company issued a system-wide franchise of its obligations to meet the requirements of section 20 of P.L. , c. (C.) (pending before the Legislature as this bill).

20. (New section) a. As part of any system-wide franchise issued by the board pursuant to P.L.1972, c.186 (C.48:5A-1 et seq.), a CATV company shall be required to:

(1) begin providing cable television service on a commercial basis, within three years of issuance of the system-wide franchise, in:

(a) each county seat that is within the CATV company’s service area; and

(b) each municipality within the CATV company's service area that has a population density greater than 7,111 persons per square mile of land area, as determined by the most recent federal decennial census prior to the enactment of P.L. , c. (C.) (pending before the Legislature as this bill).

The requirements of this paragraph shall only apply to CATV companies that on the date of the issuance of the system-wide franchise provide more than 40 percent of the local exchange telephone service market in this State;

(2) make cable television service available throughout the residential areas of any such municipalities within six years of the date the CATV company first provides cable television service on a commercial basis directly to multiple subscribers within such central office area, subject to the CATV company's line extension policy; provided, however, that such provision of service shall not be required in: (a) areas where developments or buildings are subject to claimed exclusive arrangements with other CATV companies; (b) developments or buildings that the CATV company cannot access, using its standard technical solutions, under commercially reasonable terms and conditions after good faith negotiation; or (c) areas in which the CATV company is unable to access the public rights-of-way under reasonable terms and conditions. The requirements of this paragraph shall only apply to CATV companies that on the date of the issuance of the system-wide franchise provide more than 40 percent of the local exchange telephone service market in this State. As used in this subsection, "central office" has the same meaning as that term is defined in 47 C.F.R. Part 36, Appendix, and "central office area" means the towns or portions of towns served by such central office;

(3) provide service within the CATV company's service area where cable television service is being offered, without discrimination against any group of potential residential cable subscribers because of the incomes levels of the residents of the local area in which such groups reside; and

(4) fully complete a system capable of providing cable television service to all households within the CATV company's service area where cable television service is being offered, subject to the CATV company's line extension policy and the provisions of paragraphs (1) through (3) of this subsection.

b. Any person affected by the requirements of subsection a. of this section may seek enforcement of such requirements by initiating a proceeding with the board. As used in this section, an affected person includes a municipality within which the potential residential subscribers referred to in subsection a. of this section reside.

c. If the board determines that a CATV company has denied access to cable television service to a group of potential residential subscribers because of the income levels of the residents of the

local area in which such group resides or has failed to meet the requirements of paragraph (2) of subsection a. of this section, the board is authorized to, after conducting a hearing with full notice and opportunity to be heard, impose monetary penalties of not less than $50,000, nor more than $100,000 per municipality, not to exceed a total of $3,650,000 per year for all violations. A municipality in which the provider offers cable television service shall be an appropriate party in any such proceeding.

d. The board shall convene proceedings within 36 months after the grant of the first issued system-wide franchise to examine the effects of the entry of system-wide franchisees into the State's cable television market, and shall, within six months of convening such proceedings, report to the Legislature on the following: (1) the extent of actual deployment of cable service by each system-wide franchisee, including the income and race of persons in the areas where such facilities were deployed; (2) the franchisee's effect on choice in the marketplace; and (3) the effect that introduction of system-wide competitors has had on consumers. The study shall be transmitted to the Governor, the President of the Senate, the Speaker of the General Assembly, the Minority Leader of the Senate, the Minority Leader of the General Assembly, and the members of the Senate Economic Growth Committee and the Assembly Telecommunications and Utilities Committee, or their respective successor committees.

21. Section 26 of P.L.1972, c.186 (C.48:5A-26) is amended to read as follows:

26. a. **[**An**]** Any ordinance issuing a municipal consent pursuant to **[**this act**]** P.L.1972, c.186 (C.48:5A-1 et seq.) shall designate some officer, office, bureau or other agency of the municipal government as "complaint officer" to receive and act upon complaints by subscribers to cable television reception service of the CATV company to which such consent is issued; and shall provide for the establishment of procedures and methods by which such complaints shall be received, processed and acted upon, for the resolution and settlement of complaints and disputes between such subscribers and the company, and for the enforcement of decisions made by such "complaint officer." All complaints by such subscribers alleging inadequate, unsafe or improper service or failure by the company to comply with the terms of the municipal consent shall be made in the first instance to such "complaint officer." The "complaint officer" shall, within 30 days of the receipt of such a complaint, report in writing to the subscriber the disposition or status of **[**his**]** the subscriber's complaint. Any subscriber or CATV company aggrieved by the action of a "complaint officer" in connection with such complaint or dispute, or any subscriber who shall not have received the written report

required under this section within 30 days, may petition the office for a hearing upon said complaint, under the rules promulgated by the director for the hearing and disposition of such matters.

b. Any municipality may, in lieu of complying with the terms of subsection a. of this section, provide in the ordinance issuing its municipal consent that complaints by local subscribers to cable television reception service shall be filed directly with the office, which shall thereupon be deemed the "complaint officer" for purposes of this section.

c. Each CATV company receiving a municipal consent or a system-wide franchise issued pursuant to P.L.1972, c.186 (C.48:5A-1 et seq.), shall provide to each subscriber to its cable television reception service, at the time **[**of his becoming**]** that person becomes a subscriber and at least once in each calendar year thereafter while **[**he**]** that person remains a subscriber, in a form approved by the director, information as to the identity of the "complaint officer," **[**of**]** which for system-wide franchises shall be the Office of Cable Television, the identity and location of the local business office or agent required under subsection d. of this section, and **[**of**]** the procedure to be followed in making and pursuing complaints to the "complaint officer" or the office pursuant to this section.

d. A municipal consent or system-wide franchise issued pursuant to **[**this act**]** P.L.1972, c.186 (C.48:5A-1 et seq.) shall require that the CATV company to which it is issued shall maintain **[**a**]** local business **[**office or agent**]** offices or agents, for the purpose of receiving, investigating and resolving all complaints regarding the quality of service, equipment malfunctions, and similar matters.

(cf: P.L.1972, c.186, s.26)

22. Section 8 of P.L.2003, c.38 (C.48:5A-26.1) is amended to read as follows:

8. a. In addition to the requirements as provided in section 26 of P.L.1972, c.186 (C.48:5A-26), the board shall, upon notice, by order in writing require every CATV company to keep for at least a period of **[**one year**]** three years, a record of complaints received at the CATV company's office, which shall include the name and address of the subscriber, the date, the nature of complaint, any corrective action taken if required, and the final disposition of the complaint. The record shall be available for inspection by the staff of the office. Copies of such record shall be provided to the staff of the office upon request.

b. Every CATV company shall furnish to the office annually a detailed report of the number and character of complaints made by customers and communicated to the CATV company. In meeting such requirement, the board shall establish a procedure for CATV

companies to record and characterize those customer complaints using a uniform reporting methodology and containing those matters as the board may from time to time prescribe. Copies of the report shall be forwarded to the Governor and members of the Legislature. All reports submitted to the office shall comply with the provisions of the "Cable Subscriber Privacy Protection Act," P.L.1988, c.121 (C.48:5A-54 et seq.).
(cf: P.L.2003, c.38, s.8)

23. Section 28 of P.L.1972, c.186 (C.48:5A-28) is amended to read as follows:

28. **[**In addition to whatever other information may be required by the director under duly promulgated rules and regulations to be contained in any application for a municipal consent, each**]** Each **[**such**]** application for a municipal consent or system-wide franchise shall contain:

a. A description of the initial area to be served.

b. A description of the proposed service in terms of the number of channels of cable television reception service.

c. Sufficient evidence that the applicant **[**company**]** has the financial and technical capacity and the legal, character and other qualifications to construct, maintain and operate the necessary installations, lines and equipment and to provide the service proposed in a safe, adequate and proper manner.

d. Evidence of sufficient bond, or commitment therefor, with sureties to be approved by the **[**municipality**]** office, in the penal sum of not less than **[**$25,000.00**]** $25,000 for the faithful performance of all undertakings by the **[**company**]** applicant as represented in the application; the sufficiency of which shall be subject to review by the director and approval by the board.

e. An undertaking to hold the **[**municipality**]** board and all municipalities served harmless from any liability arising out of the **[**company's**]** applicant’s operation and construction of its CATV system.

f. Evidence of sufficient insurance insuring the **[**municipality**]** board, all municipalities served and the **[**company**]** applicant with respect to all liability for any death, personal injury, property damage or other liability arising out of the **[**company's**]** applicant’s construction and operation of its CATV system; the sufficiency of which shall be subject to review by the director and approval by the board. Such insurance shall be **[**in the minimum amounts of**]** no less than: (1) **[**$150,000.00**]** $150,000 for bodily injury or death to any one person, within the limit, however, of **[**$500,000.00**]** $500,000 for bodily injury or death resulting from any one accident, (2) **[**$100,000.00**]** $100,000 for property damage resulting from any one accident, and (3) **[**$50,000.00**]** $50,000 for all other types

of liability; the sufficiency of which shall be subject to review by the director and approval by the board.

g. A schedule of proposed rates for cable television reception service, which rates shall not be altered during the term for which the municipal consent is issued, except by application to the board for amendment of the terms and conditions of said consent after public hearing, subject to the rules of the office, review by the director and approval by the board, or amendment pursuant to the provisions of subsection **[**c. of section 16 of this act or subsection**]** b. of section 11 of **[**this act**]** P.L.1972, c.186 (C.48:5A-11).

h. (1) With regard only to applications for a system-wide franchise, a commitment as to those municipalities that are served by a CATV company at the time of the application, to match or surpass any line extension policy operative at the time the system-wide franchise is granted and placed into effect prior to the enactment of P.L. , c. (C.) (pending before the Legislature as this bill) by a local franchise or certificate of approval, for the duration of the system-wide franchise. In any event, the CATV company shall extend its plant along public rights-of-way to all residences and businesses within 150 aerial feet of the CATV company's existing plant at no cost beyond the normal installation rate, and to all residences and businesses within 100 underground feet of the CATV company's plant at no cost beyond the normal installation rate, and shall set a minimum house per mile density of not less than 35 homes per square mile.

(2) This commitment shall be in addition to any and all board orders and rules that impact upon the extension of plant, except that such commitment shall supersede the board's regulations adopted as N.J.A.C. 14:3-8.1 et seq., which shall not apply to CATV companies, including telecommunications service providers that have obtained a system-wide franchise.

i. With regard only to applications for a system-wide franchise, a commitment to provide to each municipality that is served by a CATV company, with two public, educational and governmental access channels. In the event that two or more access channels are requested by a municipality, the municipality shall demonstrate that its cable-related needs require the provision of such additional access channels. Any and all CATV companies operating in a municipality shall provide interconnection to all other CATV companies on reasonable terms and conditions, and the board shall adopt regulations for procedures by which disputes between such CATV companies shall be determined and expeditiously resolved. Each municipality or its non-profit designee shall assume responsibility for the management, operations and programming of the public, educational and governmental access channels.

j. With regard only to applications for a system-wide franchise, a commitment to install and retain or provide, without charge, one

service outlet activated for basic service to any and all fire stations, public schools, police stations, public libraries, and other such buildings used for municipal purposes.

k. With regard only to applications for a system-wide franchise, a commitment to provide free Internet service, without charge, through one service outlet activated for basic service to any and all fire stations, public schools, police stations, public libraries, and other such buildings used for municipal purposes.

l. With regard only to applications for a system-wide franchise, a commitment to provide equipment and training for access users, without charge, on a schedule to be agreed upon between the municipality and the CATV company.

m. With regard only to applications for a system-wide franchise, a commitment to provide a return feed from any one location in the municipality, without charge, to the CATV company's headend or other location of interconnection to the cable television system for public, educational or governmental use, which return feed, at a minimum, provides the ability for the municipality to cablecast live or taped access programming, in real time, as may be applicable, to the CATV company's customers in the municipality. No CATV company is responsible for providing a return access feed unless a municipality requests such a feed in writing. A CATV company that has interconnected with another CATV company may require the second CATV company to pay for half of the CATV company's absorbed costs for extension.

n. With regard only to applications for a system-wide franchise, a commitment to meet any consumer protection requirements applicable, pursuant to board regulations, to cable television companies operating under certificates of approval.

(cf: P.L.1972, c.186, s.28)

24. (New section) The board shall adopt rules for procedures for resolving disputes between CATV companies and between CATV companies and municipalities concerning the provisions of subsections i. through m. of section 28 of P.L.1972, c.186 (C.48:5A-28).

25. (New section) a. All of the elements required to be included in the franchise application pursuant to P.L.1972, c.186 (C.48:5A-1 et seq.) shall form, in part, the foundation for the board's decision as to the certificate of approval or system-wide franchise.

b. The failure of a cable television company to abide by or conform its practices to the commitments in the application shall be considered a violation of the certificate of approval or system-wide franchise, and the board may enforce these provisions through any appropriate method, including the imposition of monetary penalties under section 51 of P.L.1972, c.186 (C.48:5A-51), or the

suspension or revocation of the certificate of approval or system-wide franchise.

26. Section 29 of P.L.1972, c.186 (C.48:5A-29) is amended to read as follows:

29. All proposals and representations included in an application for municipal consent or a system-wide franchise shall conform to applicable rules and regulations of the office; except that nothing in **[**this act**]** P.L.1972, c.186 (C.48:5A-1 et seq.) shall be construed to prevent an applicant from exceeding minimum requirements set by the office, or offering facilities and services not required or forbidden by such rules and regulations.

(cf: P.L.1972, c.186, s.29)

27. Section 30 of P.L.1972, c.186 (C.48:5A-30) is amended to read as follows:

30. a. **[**In**]** Except as provided in subsection d. of this section, in consideration of a municipal consent issued under **[**this section**]** P.L.1972, c.186 (C.48:5A-1 et seq.), the CATV company to which **[**it**]** the municipal consent is issued shall annually pay to **[**the**]** each municipality **[**granting the same**]** served by the CATV company, in lieu of all other franchise taxes and municipal license fees, a sum equal to **[**2%**]** two percent of the gross revenues from all recurring charges in the nature of subscription fees paid by subscribers to its cable television reception service in such municipality. Each CATV company shall, on or before the twenty-fifth day of January each year, file with the chief fiscal officer of each municipality in the territory in which it is certificated to operate a statement, verified by oath, showing the gross receipts from such charges, and shall at the same time pay thereon to **[**said**]** the chief fiscal officer of the municipality the **[**2%**]** two percent charge hereby imposed on those receipts as a yearly franchise revenue for the use of the streets.

b. Any CATV company which, pursuant to any agreement in effect prior to **[**the date of this act**]** December 15, 1972, paid or had agreed to pay to any municipality in fees or other charges in consideration of the consent of such municipality to the use of streets, alleys and public places thereof for the installation and operation of a CATV system, or similar consideration, a sum or rate exceeding that which it would pay pursuant to this section shall, in applying for a certificate **[**(other than the certificate granted pursuant to subsection f. of section 17 of this act)**]** of approval show to the satisfaction of the board that the reduction in such payments effectuated by the application of this section shall be reflected in (1) commensurate reduction of rates to subscribers to cable television reception service or (2) commensurate improvements in such service made available to such subscribers.

If the board is not so satisfied it shall amend, as excessive, the rate schedule contained in the application so that such rates shall be reduced to a degree commensurate with the reduction in payments by the CATV company to the municipality.

c. ⟦A⟧ In consideration of a municipal consent issued to a CATV company pursuant to P.L.1972, c.186 (C.48:5A-1 et seq.), a municipality may petition the board for permission to charge a yearly franchise fee exceeding that prescribed in subsection a. of this section. A municipal consent setting such a fee in excess of the amount prescribed in subsection a. of this section shall be deemed to constitute such a petition when filed with the board pursuant to section 16 of ⟦this act⟧ P.L.1972, c.186 (C.48:5A-16) as part of an application for certificate of approval. A hearing pursuant to the provisions of section 16 of P.L.1972, c.186 (C.48:5A-16) shall be held upon any application containing such petition, or upon any such petition separately filed, and at such hearing full notice and opportunity to be heard upon the matter shall be accorded to both the municipality and any CATV company affected thereby. The board after such hearing and upon recommendation of the director may grant such petition and allow the imposition of a franchise revenue exceeding that prescribed in subsection a. of this section, and at a rate to be prescribed by the board, when the board is satisfied that the same is warranted by the expenses to the municipality with respect to the regulation or supervision within its territory of cable television, or any other expenses caused by the existence and operation within its territory of cable television service.

d. In consideration of a system-wide franchise issued under P.L.1972, c.186 (C.48:5A-1 et seq.), once the CATV company receiving such system-wide franchise serves one or more residents within a municipality, then such CATV company shall pay the fees as provided in paragraphs (1) and (2) of this subsection, and once such CATV company files a certification with the board certifying that the company is capable of serving 60 percent or more of the households within such municipality that are served by a CATV company that has received a municipal consent issued under P.L.1972, c.186 (C.48:5A-1 et seq.) and the board approves such certification, both the CATV company receiving such system-wide franchise and a CATV company in such municipality that has received a municipal consent issued under P.L.1972, c.186 (C.48:5A-1 et seq.), shall annually pay:

(1) to such municipality served by the CATV company, in lieu of all other franchise taxes and municipal license fees, and for the purpose of providing local property tax relief, a sum equal to three and one half percent of the gross revenues, as this term is defined in section 3 of P.L.1972, c.186 (C.48:5A-3), that the company derives during the calendar year from cable television service charges or

fees paid by subscribers in the municipality to the company; and

(2) to the State Treasurer, on behalf of persons residing in the municipality who are eligible for the "Pharmaceutical Assistance to the Aged and Disabled" program established pursuant to P.L.1975, c.194 (C.30:4D-20 et seq.), a sum equal to the amount that such eligible persons pay as charges or fees to the company for providing basic cable service to such persons, provided that the yearly total of such payments from the company shall not exceed one half of one percent of the gross revenues, as this term is defined in section 3 of P.L.1972, c.186 (C.48:5A-3), that the company derives during the calendar year from cable television service charges or fees paid by subscribers in the municipality to the company. The State Treasurer shall establish a “CATV Universal Access Fund,” for the purposes described in this paragraph.

e. Each CATV company shall, on or before the twenty-fifth day of January each year, file with the chief fiscal officer of each municipality in the territory in which it is certificated to operate a statement, verified by oath, showing the gross receipts from the charges described in subsection d. of this section, and shall at the same time pay thereon: (1) to the chief fiscal officer of the municipality the three and one-half percent charge hereby imposed on those receipts as a yearly franchise revenue for the purpose of providing local property tax relief; and (2) to the State Treasurer, for deposit into the “CATV Universal Access Fund,” for the purpose of providing payment to eligible subscribers residing in the municipality an amount equal to the charges or fees paid by such subscribers during the preceding calendar year to the company for providing basic cable service to such subscribers, provided that the yearly total of such payments by the company to such subscribers does not exceed the one half of one percent charge hereby imposed.

f. For the purposes of this section, in the case of a cable service that may be bundled or integrated functionally with other services, capabilities or applications, the fee required by this section shall be applied only to the gross revenue from charges or fees derived from revenues attributable to the provision of cable service, as reflected on the books and records of the holder in accordance with Federal Communications Commission rules, regulations, standards or orders.

g. For the purposes of this section, within 45 days of the date of receipt of the certification filed pursuant to subsection d. of this section, the board shall issue an order in writing approving the certification, or the board shall disapprove the certification in writing citing the reasons for disapproval. If the board fails to either approve or disapprove the certification within the 45-day period, the certification shall be deemed to be approved. If, during the 45-day period, the board determines to disapprove the certification, the board shall schedule a meeting with the CATV company to explain to the CATV company the reasons for the

board's disapproval and to allow the CATV company to question the board concerning the reasons for the board's disapproval. Such meeting shall be scheduled no later than two weeks following the expiration of the 45-day period required by this subsection. The CATV company shall have 30 days following the date of the meeting with the board required by this subsection to file an appeal of the board's decision. The board shall thereafter schedule an administrative hearing not later than the thirtieth day following the date of the filing of the CATV company's appeal in order to consider the CATV company's appeal. The board shall issue a final decision in written form on the CATV company's appeal not later than the sixtieth day following the administrative hearing, required by this subsection, on the CATV company's appeal.

(cf: P.L.1972, c.186, s.30)

28. Section 47 of P.L.1972, c.186 (C.48:5A-47) is amended to read as follows:

47. The board may, after affording the holder an opportunity to be heard, revoke, suspend or alter any certificate of approval or franchise for the violation of any provisions of **[**this act**]** P.L.1972, c.186 (C.48:5A-1 et seq.) or the rules, regulations or orders made under authority of **[**this act**]** P.L.1972, c.186 (C.48:5A-1 et seq.), or for other reasonable cause, upon a finding that the revocation, suspension or alteration will not adversely affect the public interest in the provision of safe, adequate and proper cable television service in this State.

(cf: P.L.1972, c.186, s.47)

29. Section 51 of P.L.1972, c.186 (C.48:5A-51) is amended to read as follows:

51. a. Any person or any officer or agent thereof who shall knowingly violate any of the provisions of **[**this act**]** P.L.1972, c.186 (C.48:5A-1 et seq.) or aid or advise in such violation, or who, as principal, manager, director, agent, servant or employee knowingly does any act comprising a part of such violation, is guilty of a misdemeanor.

b. Any person who shall violate any provision of **[**this act**]** P.L.1972, c.186 (C.48:5A-1 et seq.) or any rule, regulation or order duly promulgated hereunder, shall be liable to a penalty of not more than **[**$500.00**]** $1,000 for a first offense, not less than **[**$100.00**]** $2,000 nor more than **[**$1,000.00**]** $5,000 for a second offense, and not less than **[**$500.00**]** $5,000 nor more than **[**$1,000.00**]** $10,000 for a third and every subsequent offense. The penalties provided in this subsection **[**shall**]** may be enforced by summary proceedings instituted by the board in the name of the State in accordance with **[**"the penalty enforcement law" (N.J.S.2A:58-1 et seq.). The Superior Court and the municipal courts shall have jurisdiction to

enforce said "penalty enforcement law" in connection with this act**]** the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.). For the purposes of the fines imposed pursuant to this subsection, a "cable television company" shall include all of the affiliates of such company.

c. Whenever it shall appear to the board that any person has violated, intends to violate, or will violate any provisions of this act or any rule, regulation or order duly promulgated hereunder, the board may institute a civil action in the Superior Court for injunctive relief and for such other relief as may be appropriate in the circumstances, and the said court may proceed in any such action in a summary manner.

(cf: P.L.1991, c.91, s.470)

30. (New section) a. The Commissioner of Community Affairs, in consultation with the Board of Public Utilities, shall develop and conduct a study to investigate how CATV companies can overcome the technical, physical and other barriers to the provision of cable television services to residents of multiple dwellings in New Jersey. The Commissioner is directed to consider the relevant experiences of those CATV companies that have received a certificate of approval, those CATV companies that have received a system-wide franchise, or any other new or existing entrants to the cable television market in this State.

b. In preparing the study, the commissioner shall investigate any model codes, such as the "BOCA National Existing Structures Code of 1987," the New Jersey Housing Rehabilitation code promulgated pursuant to P.L.1995, c.78 (C.52:27D-123.7 et seq.) and experiences of other code enforcement jurisdictions, to consult with individuals and organizations experienced in the construction or rehabilitation of multiple dwellings in this State and conduct research as may be relevant to the purposes of P.L.1972, c.186 (C.48:5A-1 et seq.).

c. The commissioner shall, within 18 months of the date of enactment of P.L. , c. (C.) (pending before the Legislature as this bill), submit a written report to the Governor and Legislature, pursuant to section 2 of P.L.1991, c.164 (C.52:14-19.1), setting forth the findings and recommendations of this study as well as making such recommendations for further legislative action as the commissioner may deem likely to remove those barriers.

31. Except as otherwise provided in paragraph (2) of subsection h. of section 28 of P.L.1972, c.186 (C.48:5A-28), the provisions of P.L. , c. (C.) (pending before the Legislature as this bill) shall not be construed to in any way conflict with any obligations that may exist under any and all applicable board orders and rules that are in place on the effective date of P.L. , c. (C.) (pending before the Legislature as this bill).

32. This act shall take effect immediately, but sections 1 through 31 shall be inoperative until the 90th day after enactment, except that the board may take such anticipatory administrative action as may be necessary to effectuate the purposes of P.L. , c. (C.) (pending before the Legislature as this bill).

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

SESSION LAW 2006-151
HOUSE BILL 2047

AN ACT TO PROMOTE CONSUMER CHOICE IN VIDEO SERVICE PROVIDERS AND TO ESTABLISH UNIFORM TAXES FOR VIDEO PROGRAMMING SERVICES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 66 of the General Statutes is amended by adding a new Article to read:

"Article 42.
"State Franchise for Cable Television Service.

"**§ 66-350. Definitions.**

The following definitions apply in this Article:

(1) Cable service. – Defined in G.S. 105-164.3.
(2) Cable system. – Defined in 47 U.S.C. § 522.
(3) Channel. – A portion of the electromagnetic frequency spectrum that is used in a cable system and is capable of delivering a television channel.
(4) Existing agreement. – A local franchise agreement that was awarded under G.S. 153A-137 or G.S. 160A-319 and meets either of the following:
  a. Is in effect on January 1, 2007.
  b. Expired before January 1, 2007, and the cable service provider under the agreement provides cable service to subscribers in the franchise area on January 1, 2007.
(5) Pass a household. – Make service available to a household, regardless of whether the household subscribes to the service.
(6) PEG channel. – A public, educational, or governmental access channel provided to a county or city.
(7) Secretary. – The Secretary of State.
(8) Video programming. – Defined in G.S. 105-164.3.

"**§ 66-351. State franchising authority.**

(a) Authority. – The Secretary of State is designated the exclusive franchising authority in this State for cable service provided over a cable system. This designation replaces the authorization to counties and cities in former G.S. 153A-137 and G.S. 160A-319 to award a franchise for cable service. This designation is effective January 1, 2007. After this date, a county or city may not award or renew a franchise for cable service.

(b) Award and Scope. – The Secretary is considered to have awarded a franchise to a person who files a notice of franchise under G.S. 66-352. A franchise for cable service authorizes the holder of the franchise to construct and operate a cable system over public rights-of-way within the area to be served. Chapter 160A of the General Statutes governs the regulation of public rights-of-way by a city.

"**§ 66-352. Award of franchise and commencement of service.**

(a) Notice of Franchise. – A person who intends to provide cable service over a cable system in an area must file a notice of franchise with the Secretary before

providing the service. A person who files a notice of franchise must pay a fee in the amount set in G.S. 57C-1-22 for filing articles of organization.

A notice of franchise is effective when it is filed with the Secretary. The notice of franchise must include all of the following:

(1) The applicant's name, principal place of business, mailing address, physical address, telephone number, and e-mail address.
(2) A description and map of the area to be served.
(3) A list of each county and city in which the described service area is located, in whole or in part.
(4) A schedule indicating when service is expected to be offered in the service area.

(b) Commencement of Service. – A person who files a notice of franchise under subsection (a) of this section must begin providing cable service in the service area described in the notice within 120 days after the notice is filed. If cable service does not begin within this period, the notice of franchise terminates 130 days after it was filed. If cable service begins within this period, the holder of the State-issued franchise must file a notice of service with the Secretary within 10 days after the cable service begins. Cable service begins when it passes one or more households in the described service area. This subsection does not apply to a cable service provider who terminates an existing agreement whose franchise area includes all of the service area described in a notice of franchise filed by the provider under subsection (a) of this section.

A notice of service for a service area must include all of the following:

(1) The effective date of a notice of franchise for that area.
(2) A description and map of the service area.
(3) A statement that cable service has begun in the service area.

(c) Extension. – A person who intends to provide cable service over a cable system in an area that is contiguous with but outside the service area described in a notice of franchise on file with the Secretary must file a notice of franchise under subsection (a) of this section that includes the proposed area. The initial service requirements in subsection (b) of this section apply to the proposed area. If the map of the area to be served includes any area that is part of the service area of another State-issued franchise, the termination of a notice of franchise for the proposed area for failure to begin service within the required time does not affect the status of the other State-issued franchise.

(d) Withdrawal. – A person may withdraw a notice of franchise by filing a notice of withdrawal with the Secretary. The notice of withdrawal must be filed at least 90 days before the service is withdrawn.

"**§ 66-353. Annual service report.**

A holder of a State-issued franchise must file an annual service report with the Secretary. The report must be filed on or before July 31 of each year. The report must be accompanied by a fee in the amount set in G.S. 57C-1-22 for filing an annual report. The report must include all of the following:

(1) The effective date of a notice of franchise for that area.
(2) A description and map of the service area.
(3) The approximate number of households in the service area.
(4) A description and a map of the households passed in the service area as of July 1.
(5) The percentage of households passed in the service area as of July 1.
(6) The percentage of households passed in the service area as of July 1 of any preceding year for which a report was required under this section.
(7) A report indicating the extent to which the holder has met the customer service requirements under G.S. 66-356(b).
(8) A schedule indicating when service is expected to be offered in the service area, to the extent the schedule differs from one included in the

notice of franchise or in a report previously submitted under this section, and an explanation of the reason for the new schedule.

"**§ 66-354. General filing and report requirements.**

(a) General. – A document filed with the Secretary under this Article must be signed by an officer or general partner of the person submitting the document. Within five days after a person files a document with the Secretary under this Article, the person must send a copy of the document to any county or city included in the service area described in the document and to the registered agent of any cable service provider that is providing cable service under an existing agreement in the service area described in the document.

The provisions of Article 2 of Chapter 55D of the General Statutes apply to the submission of a document under this Article. A document filed under this Article is a public record as defined in G.S. 132-1. The Secretary must post a document filed under this Article on its Internet Web site or indicate on its Internet Web site that the document has been filed and is available for inspection.

A successor in interest to a person who has filed a notice of franchise is not required to file another notice of franchise. When a change in ownership occurs, the owner must file a notice of change in ownership with the Secretary within 14 days after the change becomes effective.

(b) Forfeiture. – A person who offers cable service over a cable system without filing a notice of franchise or a notice of service as required by this Article is subject to forfeiture of the revenue received during the period of noncompliance from subscribers to the cable service in the area of noncompliance. Forfeiture does not apply to revenue received from cable service provided over a cable system in an area that is adjacent to a service area described in a notice of franchise and notice of service filed by that cable service provider under G.S. 66-352 if the provider obtains a State-issued franchise and files a notice of service that includes this area within 20 days after a civil action for forfeiture is filed. A forfeiture does not affect the liability of the cable service provider for sales tax due under G.S. 105-164.4 on cable service.

A cable service provider whose area includes the area in which a person is providing cable service without complying with the notice of franchise and notice of service requirements may bring a civil action for forfeiture. The amount required to be forfeited in the action must be remitted to the Civil Penalty and Forfeiture Fund established in G.S. 115C-457.2.

"**§ 66-355. Effect on existing local franchise agreement.**

(a) Existing Agreement. – This Article does not affect an existing agreement except as follows:

(1) Effective January 1, 2007, gross revenue used to calculate the payment of the franchise tax imposed by G.S. 153A-154 or G.S. 160A-214 does not include gross receipts from cable service subject to sales tax under G.S. 105-164.4. This exclusion does not otherwise affect the calculation of gross revenue and the payment to counties and cities of franchise tax revenue under existing agreements that have not been terminated under subsection (b) of this section.

(2) A cable service provider under an existing agreement that is in effect on January 1, 2007, may terminate the agreement in accordance with subsection (b) of this section in any of the following circumstances:

a. A notice of service filed under G.S. 66-352 indicates that one or more households in the franchise area of the existing agreement are passed by both the cable service provider under the existing agreement and the holder of a State-issued franchise.

b. As of January 1, 2007, a county or city has an existing agreement with more than one cable service provider for substantially the same franchise area and at least twenty-five percent (25%) of the households in the franchise areas of the

existing agreements are passed by more than one cable service provider.

c. A person provides wireline competition in the franchise area of the existing agreement by offering video programming over wireline facilities to single family households by a method that does not require a franchise under this Article. A notice of termination filed on the basis of wireline competition must include evidence of the competition in providing video programming service, such as an advertisement announcing the availability of the service, the acceptance of an order for the service, and information on the provider's Web site about the availability of the service. A county or city is allowed 60 days to review the evidence. The effective date of the termination is tolled during this review period. At the end of this period, the termination proceeds unless the county or city has obtained an order enjoining the termination based on the cable service provider's failure to establish the existence of wireline competition in its franchise area.

(3) A cable service provider under an existing agreement that expired before January 1, 2007, may obtain a State-issued franchise. The provider does not have to terminate the agreement in accordance with subsection (b) of this section because the agreement has expired.

(b) Termination. – To terminate an existing agreement, a cable service provider must file a notice of termination with the affected county or city and file a notice of franchise with the Secretary. A termination of an existing agreement becomes effective at the end of the month in which the notice of termination is filed with the affected county or city. A termination of an existing agreement ends the obligations under the agreement and under any local cable regulatory ordinance that specifically authorizes the agreement as of the effective date of the termination but does not affect the rights or liabilities of the county or city, a taxpayer, or another person arising under the existing agreement or local ordinance before the effective date of the termination.

"**§ 66-356. Service standards and requirements.**

(a) Discrimination Prohibited. – A person who provides cable service over a cable system may not deny access to the service to any group of potential residential subscribers within the filed service area because of the race or income of the residents. A violation of this subsection is an unfair or deceptive act or practice under G.S. 75-1.1.

In determining whether a cable service provider has violated this subsection with respect to a group of potential residential subscribers in a service area, the following factors must be considered:

(1) The length of time since the provider filed the notice of service for the area. If less than a year has elapsed since the notice of service was filed, it is conclusively presumed that a violation has not occurred.

(2) The cost of providing service to the affected group due to distance from facilities, density, or other factors.

(3) Technological impediments to providing service to the affected group.

(4) Inability to obtain access to property required to provide service to the affected group.

(5) Competitive pressure to respond to service offered by another cable service provider or other provider of video programming.

(b) FCC Standards. – A person who provides cable service over a cable system must comply with the customer service requirements in 47 C.F.R. Part 76 and emergency alert requirements established by the Federal Communications Commission.

(c) Complaints. – The Consumer Protection Division of the Attorney General's Office is designated as the State agency to receive and respond to customer complaints

concerning cable services. Persistent or repeated violations of the federal customer service requirements or the terms and conditions of the cable service provider's agreement with customers are unfair or deceptive acts or practices under G.S. 75-1.1.

To facilitate the resolution of customer complaints, the cable service provider must include the following statement on the customer's bill: "If you have a complaint about your cable service, you should first contact customer service at the following telephone number: (insert the cable service provider's customer service telephone number). If the cable service provider does not satisfactorily resolve your complaint, contact the Consumer Protection Division of the Attorney General's Office of the State of North Carolina (insert information on how to contact the Consumer Protection Division of the Attorney General's Office).

(d) No Build-Out. – No build-out requirements apply to a person who provides cable service under a State-issued franchise.

"**§ 66-357. Availability and use of PEG channels.**

(a) Application. – This section applies to a person who provides cable service under a State-issued franchise. It does not apply to a person who provides cable service under an existing agreement.

(b) Local Request. – A county or city must make a written request to a cable service provider for PEG channel capacity. The request must include a statement describing the county's or city's plan to operate and program each channel requested. The cable service provider must provide the requested PEG channel capacity within the later of the following:

(1) 120 days after the cable service provider receives the written request.

(2) 30 days after any interconnection requested under G.S. 66-358(a)(1) is accomplished.

(c) Initial PEG Channels. – A city with a population of at least 50,000 is allowed a minimum of three initial PEG channels plus any channels in excess of this minimum that are activated, as of July 1, 2006, under the terms of an existing franchise agreement whose franchise area includes the city. A city with a population of less than 50,000 is allowed a minimum of two initial PEG channels plus any channels in excess of this minimum that are activated, as of July 1, 2006, under the terms of an existing franchise agreement whose franchise area includes the city. For a city included in the franchise area of an existing agreement, the agreement determines the service tier placement and transmission quality of the initial PEG channels. For a city that is not included in the franchise area of an existing agreement, the initial PEG channels must be on a basic service tier, and the transmission quality of the channels must be equivalent to those of the closest city covered by an existing agreement.

A county is allowed a minimum of two initial PEG channels plus any channels in excess of this minimum that are activated, as of July 1, 2006, under the terms of an existing franchise agreement whose franchise area includes the county. For a county included in the franchise area of an existing agreement, the agreement determines the service tier placement and transmission quality of the initial PEG channels. For a county that is not included in the franchise area of an existing agreement, the initial PEG channels must be on a basic service tier and the transmission quality of the channels must be equivalent to those of any city with PEG channels in the county.

The cable service provider must maintain the same channel designation for a PEG channel unless the service area of the State-issued franchise includes PEG channels that are operated by different counties or cities and those PEG channels have the same channel designation. Each county and city whose PEG channels are served by the same cable system headend must cooperate with each other and with the cable system provider in sharing the capacity needed to provide the PEG channels.

(d) Additional PEG Channels. – A county or city that does not have seven PEG channels, including the initial PEG channels, is eligible for an additional PEG channel if it meets the programming requirements in this subsection. A county or city that has seven PEG channels is not eligible for an additional channel.

A county or city that meets the programming requirements in this subsection may make a written request under subsection (b) of this section for an additional channel. The additional channel may be provided on any service tier. The transmission quality of the additional channel must be at least equivalent to the transmission quality of the other channels provided.

The PEG channels operated by a county or city must meet the following programming requirements for at least 120 continuous days in order for the county or city to obtain an additional channel:

(1) All of the PEG channels must have scheduled programming for at least eight hours a day.

(2) The programming content of each of the PEG channels must not repeat more than fifteen percent (15%) of the programming content on any of the other PEG channels.

(3) No more than fifteen percent (15%) of the programming content on any of the PEG channels may be character-generated programming.

(e) Use of Channels. – If a county or city no longer provides any programming for transmission over a PEG channel it has activated, the channel may be reprogrammed at the cable service provider's discretion. A cable service provider must give at least a 60-day notice to a county or city before it reprograms a PEG channel that is not used. The cable service provider must restore a previously lost PEG channel within 120 days of the date a county or city certifies to the provider a schedule that demonstrates the channel will be used.

(f) Operation of Channels. – A cable service provider is responsible only for the transmission of a PEG channel. The county or city to which the PEG channel is provided is responsible for the operation and content of the channel. A county or city that provides content to a cable service provider for transmission on a PEG channel is considered to have authorized the provider to transmit the content throughout the provider's service area, regardless of whether part of the service area is outside the boundaries of the county or city.

All programming on a PEG channel must be noncommercial. A cable service provider may not brand content on a PEG channel with its logo, name, or other identifying marks. A cable service provider is not required to transmit content on a PEG channel that is branded with the logo, name, or other identifying marks of another cable service provider.

(g) Compliance. – A county or city that has not received PEG channel capacity as required by this section may bring an action to compel a cable service provider to comply with this section.

"**§ 66-358. Transmission of PEG channels.**

(a) Service. – A cable service provider operating under a State-issued franchise must transmit a PEG channel by one of the following methods:

(1) Interconnection with another cable system operated in its service area. A cable service provider operating in the same service area as a provider under a State-issued franchise must interconnect its cable system on reasonable and competitively neutral terms with the other provider's cable system within 120 days after it receives a written request for interconnection and may not refuse to interconnect on these terms. The terms include compensation for costs incurred in interconnecting. Interconnection may be accomplished by direct cable, microwave link, satellite, or another method of connection.

(2) Transmission of the signal from each PEG channel programmer's origination site, if the origination site is in the provider's service area.

(b) Signal. – All PEG channel programming provided to a cable service provider for transmission must meet the federal National Television System Committee standards or the Advanced Television Systems Committee Standards. If a PEG channel programmer complies with these standards and the cable service provider cannot

transmit the programming without altering the transmission signal, then the cable service provider must do one of the following:

(1) Alter the transmission signal to make it compatible with the technology or protocol the cable service provider uses to deliver its cable service.

(2) Provide to the county or city the equipment needed to alter the transmission signal to make it compatible with the technology or protocol the cable service provider uses to deliver its cable service.

"**§ 66-359. PEG channel grants.**

(a) PEG Channel Fund. – The PEG Channel Fund is created as an interest-bearing special revenue fund. It consists of revenue allocated to it under G.S. 105-164.44I(b) and any other revenues appropriated to it. The e-NC Authority, created under G.S. 143B-437.46, administers the Fund.

(b) Grants. – A county or city may apply to the e-NC Authority for a grant from the PEG Channel Fund. In awarding grants from the Fund, the e-NC Authority must, to the extent possible, select applicants from all parts of the State based upon need. Grants from the Fund are subject to the following limitations:

(1) The grant may not exceed twenty-five thousand dollars ($25,000).

(2) The applicant must match the grant on a dollar-for-dollar basis.

(3) The grant may be used only for capital expenditures necessary to provide PEG channel programming.

(4) An applicant may receive no more than one grant per fiscal year.

(c) Reports. – The e-NC Authority must publish an annual report on grants awarded under this section. The report must list each grant recipient, the amount of the grant, and the purpose of the grant.

"**§ 66-360. Service to public building.**

At the written request of a county or city, a cable service provider operating under a State-issued franchise must provide cable service without charge to a public building located within 125 feet of the provider's cable system. The required service is the basic, or lowest-priced, service the provider offers to customers. The terms and conditions that apply to service provided to a residential retail customer apply to the service provided to the public building. Only one service outlet is required for a building. The cable service provider is not required to provide inside wiring and is not required to provide service that conflicts with restrictions that apply in a program licensing agreement or another contract. A public building is a building used as a public school, a charter school, a county or city library, or a function of the county or city."

SECTION 2. G.S. 105-164.3 is amended by adding a new subdivision to read:

"**§ 105-164.3. Definitions.**

The following definitions apply in this Article:

…

(50c) Video programming. – Programming provided by, or generally considered comparable to programming provided by, a television broadcast station, regardless of the method of delivery."

SECTION 3. G.S. 105-164.4(a)(6) reads as rewritten:

"(6) The combined general rate applies to the gross receipts derived from providing ~~any of the following broadcast services~~ video programming to a subscriber in this State. A cable service provider, a direct-to-home satellite service provider, and any other person engaged in the business of providing ~~any of these services~~ video programming is considered a retailer under this ~~Article:~~Article.

~~a. Direct-to-home satellite service.~~

~~b. Cable service.~~"

SECTION 4. G.S. 105-164.4C(d) is recodified as G.S. 105-164.4D with the catch line "Bundled services."

SECTION 5. G.S. 105-164.4D, as recodified by Section 4 of this act, reads as rewritten:

"**§ 105-164.4D. Bundled services.**

~~Bundled Services. —~~When a taxable ~~telecommunications~~ service is bundled with a service that is not taxable, the tax applies to the gross receipts from the taxable service in the bundle as follows:

(1) If the service provider offers all the services in the bundle on an unbundled basis, tax is due on the unbundled price of the taxable service, less the discount resulting from the bundling. The discount for a service as the result of bundling is the proportionate price decrease of the service, determined on the basis of the total unbundled price of all the services in the bundle compared to the bundled price of the services.

(2) If the service provider does not offer one or more of the services in the bundle on an unbundled basis, tax is due on the taxable service based on a reasonable allocation of revenue to that service. If the service provider maintains an account for revenue from a taxable service, the service provider's allocation of revenue to that service for the purpose of determining the tax due on the service must reflect its accounting allocation of revenue to that service."

SECTION 6. The catch line to G.S. 105-164.12B reads as rewritten:

"**§ 105-164.12B. ~~Bundled transactions.~~Tangible personal property bundled with service contract.**"

SECTION 7. G.S. 105-164.44F(a) reads as rewritten:

"(a) Amount. – The Secretary must distribute ~~to the cities~~ part of the taxes imposed by G.S. 105-164.4(a)(4c) on telecommunications service. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The amount the Secretary must distribute is ~~eighteen and three one-hundredths percent (18.03%)~~ the following percentages of the net proceeds of the taxes collected during the ~~quarter,~~ quarter:

(1) Eighteen and three one-hundredths percent (18.03%), minus two million six hundred twenty thousand nine hundred forty-eight dollars ~~($2,620,948).~~($2,620,948), must be distributed to cities in accordance with this section. ~~This~~ The deduction is one-fourth of the annual amount by which the distribution to cities of the gross receipts franchise tax on telephone companies, imposed by former G.S. 105-20, was required to be reduced beginning in fiscal year 1995-96 as a result of the "freeze deduction." ~~The Secretary must distribute the specified percentage of the proceeds, less the "freeze deduction" among the cities in accordance with this section.~~

(2) Seven and twenty-three one-hundredths percent (7.23%) must be distributed to counties and cities as provided in G.S. 105-164.44I."

SECTION 8. Article 5 of Chapter 105 of the General Statutes is amended by adding a new section to read:

"**§ 105-164.44I. Distribution of part of sales tax on video programming service and telecommunications service to counties and cities.**

(a) Distribution. – The Secretary must distribute to the counties and cities part of the taxes imposed by G.S. 105-164.4(a)(4c) on telecommunications service and G.S. 105-164.4(a)(6) on video programming service. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The amount the Secretary must distribute is the sum of the revenue listed in this subsection. The Secretary must distribute two million dollars ($2,000,000) of this amount in accordance with subsection (b) of this section and the remainder in accordance with subsections (c) and (d) of this section. The revenue to be distributed under this section consists of the following:

(1) The amount specified in G.S. 105-164.44F(a)(2).
(2) Twenty-two and sixty-one one-hundredths percent (22.61%) of the net proceeds of the taxes collected during the quarter on video programming, other than on direct-to-home satellite service.
(3) Thirty-seven percent (37%) of the net proceeds of the taxes collected during the quarter on direct-to-home satellite service.

(b) Supplemental PEG Support. – The Secretary must include the applicable amount of supplemental PEG channel support in each quarterly distribution to a county or city. The amount to include is one-fourth of twenty-five thousand dollars ($25,000) for each qualifying PEG channel operated by the county or city. The amount of money distributed under this subsection may not exceed two million dollars ($2,000,000) in a fiscal year. If the amount to be distributed for qualifying PEG channels in a fiscal year would otherwise exceed this maximum amount, the Secretary must proportionately reduce the applicable amount distributable for each PEG channel. If the amount to be distributed for qualifying PEG channels in a fiscal year is less than two million dollars ($2,000,000), the Secretary must credit the excess amount to the PEG Channel Fund established in G.S. 66-359.

A county or city must certify to the Secretary by July 15 of each year the number of qualifying PEG channels it operates. A qualifying PEG channel is one that meets the programming requirements under G.S. 66-357(d). A county or city may not receive PEG channel support under this subsection for more than three qualifying PEG channels.

The amount included under this subsection in a distribution to a county or city is intended to supplement the PEG channel support available in the amount distributed under this section. The money distributed to a county or city under this subsection must be used by it for the operation and support of PEG channels. For purposes of this subsection, the term "PEG channel" has the same meaning as in G.S. 66-350.

(c) 2006-2007 Fiscal Year Distribution. – The share of a county or city is its proportionate share of the amount to be distributed to all counties and cities under this subsection. The proportionate share of a county or city is the base amount for the county or city compared to the base amount for all other counties and cities. The base amount of a county or city that did not impose a cable franchise tax under G.S. 153A-154 or G.S. 160A-214 before July 1, 2006, is two dollars ($2.00) times the most recent annual population estimate for that county or city. The base amount of a county or city that imposed a cable franchise tax under either G.S. 153A-154 or G.S. 160A-214 before July 1, 2006, is the amount of cable franchise tax and subscriber fee revenue the county or city certifies to the Secretary that it imposed during the first six months of the 2006-2007 fiscal year. A county or city must make this certification by March 15, 2007. The certification must specify the amount of revenue that is derived from the cable franchise tax and the amount that is derived from the subscriber fee.

(d) Subsequent Distributions. – For subsequent fiscal years, the Secretary must multiply the amount of a county's or city's share under this section for the preceding fiscal year by the percentage change in its population for that fiscal year and add the result to the county's or city's share for the preceding fiscal year to obtain the county's or city's adjusted amount. Each county's or city's proportionate share for that year is its adjusted amount compared to the sum of the adjusted amounts for all counties and cities.

(e) Use of Proceeds. – A county or city that imposed subscriber fees during the first six months of the 2006-2007 fiscal year must use a portion of the funds distributed to it under subsections (c) and (d) of this section for the operation and support of PEG channels. The amount of funds that must be used for PEG channel operation and support is two times the amount of subscriber fee revenue the county or city certified to the Secretary that it imposed during the first six months of the 2006-2007 fiscal year. A county or city that used part of its franchise tax revenue in fiscal year 2005-2006 for the operation and support of PEG channels or a publicly owned and operated television

station must use the funds distributed to it under subsections (c) and (d) of this section to continue the same level of support for the PEG channels and public stations. The remainder of the distribution may be used for any public purpose.

(f) Late Information. – A county or city that does not submit information that the Secretary needs to make a distribution by the date the information is due is excluded from the distribution. If the county or city later submits the required information, the Secretary must include the county or city in the distribution for the quarter that begins after the date the information is received.

(g) Population Determination. – In making population determinations under this section, the Secretary must use the most recent annual population estimates certified to the Secretary by the State Budget Officer. For purposes of the distributions made under this section, the population of a county is the population of its unincorporated areas plus the population of an ineligible city in the county, as determined under this section.

(h) City Changes. – The following changes apply when a city alters its corporate structure or incorporates:

(1) If a city dissolves and is no longer incorporated, the proportional shares of the remaining counties and cities must be recalculated to adjust for the dissolution of that city.

(2) If two or more cities merge or otherwise consolidate, their proportional shares are combined.

(3) If a city divides into two or more cities, the proportional share of the city that divides is allocated among the new cities on a per capita basis.

(4) If a city incorporates after January 1, 2007, and the incorporation is not addressed by subdivisions (2) or (3) of this subsection, the share of the county in which the new city is located is allocated between the county and the new city on a per capita basis.

(i) Ineligible Cities. – An ineligible city is disregarded for all purposes under this section. A city incorporated on or after January 1, 2000, is not eligible for a distribution under this section unless it meets both of the following requirements:

(1) It is eligible to receive funds under G.S. 136-41.2.

(2) A majority of the mileage of its streets is open to the public.

(j) Nature. – The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution."

SECTION 9. G.S. 105-164.21B is repealed.

SECTION 10. G.S. 153A-137 is repealed.

SECTION 11. G.S. 153A-154 is repealed.

SECTION 12. G.S. 160A-211 reads as rewritten:

"**§ 160A-211. Privilege license taxes.**

(a) Authority. – Except as otherwise provided by law, a city shall have power to levy privilege license taxes on all trades, occupations, professions, businesses, and franchises carried on within the city. A city may levy privilege license taxes on the businesses that were formerly taxed by the State under the following sections of Article 2 of Chapter 105 of the General Statutes only to the extent the sections authorized cities to tax the businesses before the sections were repealed:

G.S. 105-36	Amusements – Manufacturing, selling, leasing, or distributing moving picture films.
G.S. 105-36.1	Amusements – Outdoor theatres.
G.S. 105-37	Amusements – Moving pictures – Admission.
G.S. 105-42	Private detectives and investigators.
G.S. 105-45	Collecting agencies.
G.S. 105-46	Undertakers and retail dealers in coffins.
G.S. 105-50	Pawnbrokers.

G.S. 105-51.1	Alarm systems.
G.S. 105-53	Peddlers, itinerant merchants, and specialty market operators.
G.S. 105-54	Contractors and construction companies.
G.S. 105-55	Installing elevators and automatic sprinkler systems.
G.S. 105-61	Hotels, motels, tourist courts and tourist homes.
G.S. 105-62	Restaurants.
G.S. 105-65	Music machines.
G.S. 105-65.1	Merchandising dispensers and weighing machines.
G.S. 105-66.1	Electronic video games.
G.S. 105-74	Pressing clubs, dry cleaning plants, and hat blockers.
G.S. 105-77	Tobacco warehouses.
G.S. 105-80	Firearms dealers and dealers in other weapons.
G.S. 105-85	Laundries.
G.S. 105-86	Outdoor advertising.
G.S. 105-89	Automobiles, wholesale supply dealers, and service stations.
G.S. 105-89.1	Motorcycle dealers.
G.S. 105-90	Emigrant and employment agents.
G.S. 105-91	Plumbers, heating contractors, and electricians.
G.S. 105-97	Manufacturers of ice cream.
G.S. 105-98	Branch or chain stores.
G.S. 105-99	Wholesale distributors of motor fuels.
G.S. 105-102.1	Certain cooperative associations.
G.S. 105-102.5	General business license.

(b) Barbershop and Salon Restriction. – A privilege license tax levied by a city on a barbershop or a beauty salon may not exceed two dollars and fifty cents ($2.50) for each barber, manicurist, cosmetologist, beautician, or other operator employed in the barbershop or beauty salon.

(c) ~~Piped Gas Restriction.~~ Prohibition. – A city may not ~~levy a privilege license tax on a person who is engaged in the business of supplying piped natural gas and is subject to tax under Article 5E of Chapter 105 of the General Statutes.~~ impose a license, franchise, or privilege tax on a person engaged in any of the businesses listed in this subsection. These businesses are subject to a State tax for which the city receives a share of the tax revenue.

(1) Supplying piped natural gas taxed under Article 5E of Chapter 105 of the General Statutes.

(2) Providing telecommunications service taxed under G.S. 105-164.4(a)(4c).

(3) Providing video programming taxed under G.S. 105-164.4(a)(6).

~~(d) Telecommunications Restriction. – A city may not impose a license, franchise, or privilege tax on a company taxed under G.S. 105-164.4(a)(4c).~~"

SECTION 13. G.S. 160A-214 is repealed.

SECTION 14. G.S. 160A-296(a) reads as rewritten:

"(a) A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited ~~to:~~to all of the following:

(1) The duty to keep the public streets, sidewalks, alleys, and bridges in proper ~~repair;~~repair.

(2) The duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary ~~obstructions;~~obstructions.

(3) The power to open new streets and alleys, and to widen, extend, pave, clean, and otherwise improve existing streets, sidewalks, alleys, and bridges, and to acquire the necessary land therefor by dedication and acceptance, purchase, or eminent ~~domain;~~domain.

(4) The power to close any street or alley either permanently or ~~temporarily;~~temporarily.

(5) The power to regulate the use of the public streets, sidewalks, alleys, and ~~bridges;~~bridges.

(6) The power to regulate, license, and prohibit digging in the streets, sidewalks, or alleys, or placing therein or thereon any pipes, poles, wires, fixtures, or appliances of any kind either on, above, or below the ~~surface:~~surface. To the extent a municipality is authorized under applicable law to impose a fee or charge with respect to activities conducted in its rights-of-way, the fee or charge must apply uniformly and on a competitively neutral and nondiscriminatory basis to all comparable activities by similarly situated users of the rights-of-way.

(7) The power to provide for lighting the streets, alleys, and bridges of the ~~city; and~~city.

(8) The power to grant easements in street rights-of-way as permitted by G.S. 160A-273."

SECTION 15. G.S. 160A-319(a) reads as rewritten:

"(a) A city shall have authority to grant upon reasonable terms franchises for ~~the operation within the city of~~ a telephone system and any of the enterprises listed in ~~G.S. 160A-311 and for the operation of telephone systems.~~ G.S. 160A-311, except a cable television system. A franchise granted by a city authorizes the operation of the franchised activity within the city. No franchise shall be granted for a period of more than 60 years, except that a franchise for solid waste collection or disposal systems and facilities shall not be granted for a period of more than 30 ~~years and cable television franchises shall not be granted for a period of more than 20~~ years. Except as otherwise provided by law, when a city operates an enterprise, or upon granting a franchise, a city may by ordinance make it unlawful to operate an enterprise without a franchise."

SECTION 16. To make the distribution required under G.S. 105-164.44I(b), as enacted by this act, for the 2006-2007 fiscal year, a county or city must certify to the Secretary of Revenue by March 15, 2007, the number of qualifying PEG channels it operates.

SECTION 17. A primary purpose of this act is to promote consumer choice in video service providers. A premise of this goal is that increased competition will lead to improved service. Under competition, a customer who is dissatisfied with service by one cable service provider will have the option of choosing a different service provider.

G.S. 66-356, as enacted by this act, designates the Consumer Protection Division of the Attorney General's Office as the agency to receive and respond to unresolved customer complaints about cable service provided by the holder of a State-issued franchise. The transition from local franchise agreements to State-issued franchises will occur gradually.

Due to the expected improvement in customer service and the gradual change to State-issued franchises, the impact of the requirement in new G.S. 66-356 on the staffing needs of the Consumer Protection Division is not clear. The Office of the Attorney General is therefore requested to monitor the number and type of cable service complaints it receives from customers in areas served under a local franchise agreement and from areas served under a State-issued franchise to determine whether the Consumer Protection Division needs additional staff to fulfill the duty imposed by new G.S. 66-356 and to make a report concerning staffing to the Fiscal Research Division of the North Carolina General Assembly by April 1, 2007.

SECTION 18. The Consumer Protection Division of the Attorney General's Office must report to the Revenue Laws Study Committee on or before April 1 of each

year, beginning April 1, 2008, on the following information concerning cable service complaints the Division has received from cable customers under G.S. 66-356:

(1) The number of customer complaints.
(2) The types of customer complaints.
(3) The different means of resolving customer complaints.

SECTION 19. The Secretary of State has no authority to determine whether a person who is providing video programming is providing cable service over a cable system. An award of a State-issued franchise under Article 42 of Chapter 66 of the General Statutes, as enacted by this act, does not affect a determination of whether video programming provided by the holder of the franchise is considered cable service provided over a cable system under federal law or under a state law that applies substantially the same definitions of "cable service" and "cable system" as federal law. A person who provides video programming may obtain a State-issued franchise under Article 42 of Chapter 66 of the General Statutes, as enacted by this act, and thereby become subject to that Article, regardless of whether the video programming the person provides is considered cable service provided under a cable system under that Article or under federal law.

SECTION 20. If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable.

SECTION 21. The Revenue Laws Study Committee must review the effect Article 42 of Chapter 66 of the General Statutes, as enacted by this act, has on the issues listed in this section to determine if any changes to the law are needed:

(1) Competition in video programming services.
(2) The number of cable service subscribers, the price of cable service by service tier, and the technology used to deliver the service.
(3) The deployment of broadband in the State.

The Committee must review the impact of this Article on these issues every two years and report its findings to the North Carolina General Assembly. The Committee must make its first report to the 2008 Session of the North Carolina General Assembly.

SECTION 22. This act becomes effective January 1, 2007. Sections 7 and 8 of this act apply to the distribution made within 75 days after March 31, 2007, for the quarter starting January 1, 2007.

In the General Assembly read three times and ratified this the 12th day of July, 2006.

s/ Beverly E. Perdue
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 12:45 p.m. this 20th day of July, 2006

South Carolina General Assembly
116th Session, 2005-2006

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Bill 4428

~~Indicates Matter Stricken~~
Indicates New Matter

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

AMENDED

May 9, 2006

H. 4428

Introduced by Reps. Cato, Harrell, Sandifer, Altman, Bales, Bingham, Breeland, R. Brown, G. Brown, Ceips, Chellis, Clemmons, Clyburn, Cobb-Hunter, Cooper, Cotty, Dantzler, Edge, Haley, Hamilton, Harrison, Hayes, Herbkersman, Hiott, Howard, Huggins, Jefferson, Jennings, Kirsh, Leach, Limehouse, Mack, Merrill, McGee, J.H. Neal, Owens, Perry, Rice, Scarborough, Sinclair, Skelton, D.C. Smith, F.N. Smith, G.R. Smith, G.M. Smith, J.R. Smith, Talley, Taylor, Thompson, Townsend, Vaughn, White, Witherspoon, Young, Anderson, Anthony, Battle, Funderburk, Govan, Martin, Miller, Walker, J. Brown, Clark, Branham, Bailey, Mahaffey, Scott, J.E. Smith and Viers

S. Printed 5/9/06--S. [SEC 5/11/06 1:44 PM]

Read the first time February 21, 2006.

A BILL

TO ENACT THE "SOUTH CAROLINA COMPETITIVE CABLE SERVICES ACT" INCLUDING PROVISIONS TO ADD SECTION 58-12-5 TO THE CODE OF LAWS OF SOUTH CAROLINA, 1976, SO AS TO PROVIDE FOR A LEGISLATIVE PURPOSE, FINDINGS, AND PREEMPTION IN REGARD TO CABLE SERVICE AND DESIGNATE IT AS ARTICLE 1, CHAPTER 12 OF TITLE 58, TO DESIGNATE SECTIONS 58-12-10 THROUGH 58-12-130 AS ARTICLE 2 OF CHAPTER 12 OF TITLE 58; AND TO AMEND CHAPTER 12 OF TITLE 58 BY ADDING ARTICLE 3 SO AS TO PROVIDE FOR STATE-ISSUED CERTIFICATES OF FRANCHISE AUTHORITY AUTHORIZING THE APPLICANT TO OFFER CABLE SERVICE IN

THIS STATE UNDER THE PROCEDURES AND REQUIREMENTS CONTAINED IN THIS ARTICLE.

Amend Title To Conform

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. This act is known and may be cited as the "South Carolina Competitive Cable Services Act".

SECTION 2. Chapter 12 of Title 58 of the 1976 Code is amended by adding:

"Article 1
General Provisions

Section 58-12-5. (A) Competition between cable television, satellite, and other providers has promoted and continues to promote additional consumer choices for cable service and similar services, and the technology used to provide these services is not constrained or limited by municipal or county boundaries. Accordingly, it is appropriate for the General Assembly to review and update the policy of this State with regard to these services. The General Assembly finds that revising the current system of regulation of these services will relieve consumers of unnecessary costs and burdens, encourage investment, and promote deployment of innovative offerings that provide competitive choices for consumers. Additionally, the General Assembly finds that it is in the best interests of consumers for cable franchises to be non-exclusive and for requests for competitive cable franchises not to be unreasonably refused. The General Assembly further finds that a streamlined policy framework providing statewide uniformity is necessary to allow these functionally equivalent services to compete fairly and to deploy new consumer services more quickly.

(B) After the effective date of this act, no municipality or county may issue a cable franchise pursuant to Section 58-12-30. A municipality or county may continue to enforce existing cable franchises until they expire or are terminated pursuant to Section 58-12-325.

(C) This chapter occupies the entire field of franchising or otherwise regulating cable service and pre-empts any ordinance, resolution, or similar matter adopted by a municipality or county that purports to address franchising or otherwise regulating cable service."

SECTION 3. Sections 58-12-10 through 58-12-130 of Chapter 12 of Title 58 of the 1976 Code are designated as Article 2, Franchising by Municipalities and Counties.

SECTION 4. Chapter 12 of Title 58 of the 1976 Code is amended by adding:

"Article 3

State-Issued Certificate of Franchise Authority

Section 58-12-300. As used in this article, the following terms mean:

(1) 'Cable service' is defined as set forth in 47 U.S.C. Section 522(6).

(2) 'Cable service provider' means a person or entity who is a cable operator, as defined in 47 U.S.C. Section 522(5), throughout the area it serves pursuant to Section 58-12-310, and is subject to Section 58-12-350.

(3) 'Cable system' is defined as set forth in 47 U.S.C. Section 522(7).

(4) 'Franchise' means an initial authorization, or renewal of an authorization, issued by a franchising authority regardless of whether the authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, that authorizes the construction and operation of a cable services network in the public rights-of-way.

(5) 'Franchising authority' means a governmental entity empowered by federal, state, or local law to grant a franchise for cable services. With regard to the holder of a state-issued certificate of franchise authority within the areas covered by the certificate, the Secretary of State is the sole franchising authority.

(6) 'Gross revenues' means all revenues received from subscribers for the provision of cable services, including cable franchise fees, and all revenues received from non-subscribers for advertising and home shopping services. Gross revenues shall not include:

(a) any tax, surcharge, or governmental fee billed to subscribers including, but not limited to, a business license tax levied by a municipality pursuant to Article 20, Chapter 9, Title 58;

(b) any revenue not actually received, even if billed, such as bad debt;

(c) any revenue received by any affiliate or any other person in exchange for supplying goods or services used by the provider to provide video programming;

(d) refunds, rebates, or discounts;

(e) returned check fees or interest;

(f) sales or rental of property, except such property as the subscriber is required to buy or rent exclusively from the cable service provider to receive cable service;

(g) any revenue received for installing or maintaining inside wiring for services other than cable services;

(h) any revenues from services provided over the network that are associated with or classified as noncable services under federal law, including, without limitation, revenues received from, telecommunications services, information services, Internet access services, directory or Internet advertising revenue (including, without limitation, yellow pages, white pages, banner advertisements, and electronic publishing advertising). Where the sale of any such noncable service is bundled with the sale of any cable service or services and sold for a single nonitemized price, the term 'gross revenues' shall include only those revenues that are attributable to cable services based on the provider's books and records, such revenues to be allocated in a manner consistent with Generally Accepted Accounting Principles;

(i) sales for resale with respect to which the purchaser is required to pay a franchise fee; or

(j) any reimbursement of costs including, but not limited to, the reimbursements by programmers of marketing costs incurred for the promotion or introduction of video programming.

(7) 'Incumbent cable service provider' means the cable service provider serving the largest number of subscribers in a particular municipality or in the unincorporated area of a county on the effective date of this article.

(8) 'Public right-of-way' means the area on, below, or above a public roadway, highway, street, public sidewalk, alley, or waterway.

(9) 'Video programming' means programming provided by, or generally considered comparable to, programming provided by a television broadcast station, as set forth in 47 U.S.C. Section 522(20).

Section 58-12-310. (A) Except as provided in Section 58-12-325, a person or entity providing cable service in this State on the effective date of this article under a franchise previously granted by the governing body of a municipality or county is not subject to nor may it avail itself of the state-issued certificate of franchise authority provisions of this article with respect to the municipality or county until the franchise expires. Notwithstanding the foregoing, any such cable service provider may seek authorization to provide service in areas where it currently does not have an existing franchise agreement pursuant to provisions of this article.

(B) Subject to the provisions of subsection (A), a person or entity seeking to provide cable service over a cable system as a cable service provider in this State after the effective date of this article must file an application for a state-issued certificate of franchise authority with the Secretary of State as required by this section. The application must be on a form to be established by the Secretary of State and must be accompanied by a fee, not to exceed one hundred ten dollars, to be established by the Secretary of State. If the person or entity is not authorized by other provisions of law to construct, maintain, or operate any type of facilities in the public rights-of-way, the person or entity

shall file such an application before constructing, maintaining, or operating any facilities in the public rights-of-way. If the person or entity is authorized by other provisions of law to construct, maintain, or operate any type of facilities in the public rights-of-way, the person or entity shall file the application before providing cable service over a cable system in any given service area. Such application must be accompanied by an affidavit submitted by the applicant and signed by an officer or general partner of the applicant affirming the following:

(1) that the applicant agrees to comply with all applicable federal and state laws and regulations;

(2) a written description of the municipalities and a written description of the unincorporated areas of counties to be served, in whole or in part, by the applicant, which written description must be amended by the applicant before the provision of cable service within an area not described in a previous application or amendment filed by the applicant. For purposes of this subsection, a map or other graphic representation may supplement, but not substitute for, the written description; and

(3) the location of the principal place of business and the names of the principal executive officers of the applicant.

A holder of a state-issued certificate of franchise authority who seeks to amend the certificate to include additional areas to be served shall file an amended application with the Secretary of State that reflects the new service areas to be served.

Provided, however, a holder of a state-issued certificate of franchise authority must begin to deploy service in each of the municipalities and in each of the unincorporated areas of counties described in subsection (B)(2) within one year of the date of the issuance of the certificate or the certificate becomes null and void. This provision shall not be construed to require deployment of service throughout the municipalities or the unincorporated areas of the counties described in subsection (B)(2).

(C) Within five days of receipt of an application or amended application, the Secretary of State must notify each affected municipality and county of its receipt of the application or amended application and must request from each affected municipality and county: (1) the franchise fee rate imposed on the incumbent cable service provider, if any, as of the date of the application or amended application; (2) the number of public, educational, and governmental (PEG) access channels the municipality or county has activated under the incumbent cable provider's franchise agreement as of the date of the application or amended application; and (3) whether the municipality or county consents to the state-issued certificate of franchise authority sought in the application or amended application and, if such consent is denied, an explanation of the reasons for the denial of the requested consent. The notification must contain a copy of the application of the cable service provider including the description of the area to be served.

(D) A municipality or county must respond to a request issued by the Secretary of State pursuant to subsection (C) within sixty-five days of the date of such request. If a municipality or county does not timely respond with the franchise fee rate imposed on the incumbent cable service provider, if any, as of the date of the application or amended application, the franchise fee rate for the applicant in such municipality or county shall be two percent of gross revenue until the county or municipality provides a response and the Secretary of State issues an amended certificate of franchise authority containing a franchise fee in compliance with Section 58-12-330. If a municipality or county does not timely respond with the number of PEG access channels the municipality or county has activated under the incumbent cable provider's franchise agreement as of the date of the application or amended application or with a statement that it has not activated any PEG access channels under the incumbent cable provider's franchise agreement as of such date, the applicant shall not be required to provide any PEG access channels to the municipality or county until the municipality or county provides a response and the Secretary of State issues an amended certificate of franchise authority containing the number of PEG access channels to be provided to the municipality or county in compliance with Section 58-12-370. If a municipality or county denies consent or does not timely indicate its unconditional consent to the state-issued certificate of franchise authority sought in the application or amended application, the Secretary of State shall deny the application or amended application with regard to that municipality or county and shall note on the notice of denial that the reason for the denial was the refusal of the applicable municipality or county to grant consent. If the applicant takes the position that the denial of the application or amended application is actionable, it may seek any appropriate relief under state or federal law in state or federal court, and if the applicant takes the position that the denial of consent by the municipality or county is actionable, it may add the municipality or county denying consent as a party to such action. If the Secretary of State denies the application or amended application under the provisions of this subsection and the affected municipality or county subsequently indicates its unconditional consent to the state-issued certificate of franchise authority sought in the application or amended application, the Secretary of State must promptly issue an amended certificate of franchise authority that includes such municipality or county.

(E) Within eighty days after making the request described in subsection (C), the Secretary of State shall issue the applicant a certificate of franchise authority to operate as a cable service provider and the certificate shall contain the following:

(1) a nonexclusive grant of authority to provide cable service in the areas set forth in the application;

(2) a nonexclusive grant of authority to construct, maintain, and operate facilities along, across, or on public rights-of-way in the delivery of that service, subject to the laws of this State including the lawful exercise of police powers of the municipalities and counties in which the service is delivered;

(3) the franchise fee rate for each municipality or county described in the application in compliance with Section 58-12-330; and

(4) the number of public, education, and governmental access channels to be provided upon request to each municipality or county described in the application, in compliance with Section 58-12-370.

(F) The certificate of franchise authority issued by the Secretary of State is fully transferable to a successor in interest to the applicant to which it is initially granted, provided that the successor in interest files with the Secretary of State an affidavit that complies with the requirements of subsection (B). A notice of transfer must be filed with the Secretary of State and the affected municipalities or counties within ten days of the completion of the transfer. The Secretary of State is neither required nor authorized to act upon the notice.

(G) A holder of a state-issued certificate of franchise authority shall comply with any applicable federal law or regulation addressing a-la-carte programming options.

(H) The certificate of state franchise authority issued pursuant to this article may be terminated by the cable service provider by submitting written notice of the termination to the Secretary of State and the affected municipalities or counties. The Secretary of State is neither required nor authorized to act upon such notice.

(I) The state-issued certificate of franchise authority issued pursuant to this article supersedes and is in lieu of any franchise authority or approval required by Sections 58-12-10 and 58-12-30.

(J) The Secretary of State shall keep for public examination a record of all certificates applied for or granted pursuant to the provisions of this article.

(K) The holder of a state-issued certificate of franchise authority shall give written notification to a municipality or county of the date on which it will actually begin providing service in any part of such municipality or county.

Section 58-12-320. (A) For purposes of this article, a cable service provider is deemed to have or have had a franchise to provide cable service in a specific municipality or unincorporated areas of a county if any predecessor entity of the cable service provider has or, after July 1, 2005, had a cable franchise agreement granted by that specific municipality or county.

(B) The terms 'predecessor' or 'successor entity' in this section shall include, but not be limited to, an entity receiving, obtaining, or operating under a municipal or county cable franchise through merger, sale, assignment, restructuring, or any other type of transaction.

Section 58-12-325. At the time any certificate of franchise authority is issued by the Secretary of State, the Secretary of State immediately shall post information relating to the certificate, specifically including all municipalities and counties described pursuant to Section 58-12-310(B)(2). At any time on or after the date when the holder of a state-

issued certificate of franchise authority gives notice, as required by Section 58-12-310(K), that it is beginning to offer service in a given municipality or county, any cable service provider serving such municipality or county shall have the option to terminate existing franchises previously issued by such municipality or county and instead offer cable service in such municipality or county under a certificate of franchise authority that the Secretary of State shall issue in accordance with the requirements of Section 58-12-310. A cable service provider exercising its termination option shall file a statement of termination with the Secretary of State on a form as required by the Secretary of State and submit copies of such filing with any affected municipalities or counties. Termination of existing franchises is effective immediately upon issuance of a certificate of franchising authority by the Secretary of State granting authority to provide cable service in the described municipalities and counties. Upon termination of existing franchises as provided in this section, the cable service provided by the provider exercising its termination option is governed by the provisions of this article in those municipalities and counties where the franchises have been terminated. The termination option of this section applies only with respect to municipalities and counties which have been described pursuant to Section 58-12-310(B)(2) by a holder of a state certificate of franchise authority and not with respect to franchises issued by other municipalities and counties.

Section 58-12-330. (A) Except as otherwise provided in Section 58-12-310, the holder of a state-issued certificate of franchise authority must pay a municipality or county a franchise fee equal to a specified percentage of the holder's gross revenues received from (1) the provision of cable service to subscribers located within the municipality or unincorporated areas of the county, and (2) from advertising and home shopping services as allocated under subsection (B) below. The specified percentage, hereafter referred to as the 'state-issued certificate holder's franchise fee rate', must not exceed the lesser of the incumbent cable service provider's franchise fee rate imposed by the municipality or county, if any, or five percent of the holder's gross revenues as defined in this article. No change to the franchise fee set forth in a state-issued certificate of franchise authority is effective earlier than forty-five days after the Secretary of State provides the holder of the state-issued certificate of franchise authority written notice of the change.

(B) The amount of a cable service provider's non-subscriber revenues from advertising and home shopping services that is allocable to a municipality or unincorporated area of a county is equal to the total amount of such cable service provider's revenue received from advertising and home shopping services multiplied by the ratio of the number of subscribers in such municipality or in the unincorporated area of such county on the preceding January first to the total number of subscribers receiving cable service from such cable service provider on that date.

(C) A municipality or county must promptly notify the Secretary of State of any change to its cable service franchise fee rate, and no such change shall be effective as to the holder of a state-issued certificate of franchise authority earlier than forty-five days after the Secretary of State provides the holder written notice of the change.

(D) The holder of a state-issued certificate of franchise authority must quarterly pay the amount of the franchise fees payable under this section to the affected municipalities and counties. Each quarterly payment must be made within thirty days after the end of the quarter for the preceding calendar quarter. Each payment must be accompanied by a statement showing, for the quarter covered by the payment, the state-issued certificate holder's gross revenues attributable to the municipality or unincorporated areas of the county that imposes a state-issued certificate holder's franchise fee, the applicable state-issued certificate holder's franchise fee rate for the municipality or county, and the portion of the aggregate payment attributable to the municipality or county. Any supporting statements are confidential and are exempt from disclosure under any provision of state law.

(E) The holder of a state-issued certificate of franchise authority may designate that portion of a subscriber's bill attributable to a franchise fee imposed pursuant to this article and may recover such amount from the subscriber as a separate item on the bill.

(F) No municipality or county shall levy a tax, license, fee, or other assessment on a cable service provider other than the collection of the franchise fee authorized by this section or a cable franchise fee imposed upon a cable service provider before January 1, 2006; provided, that nothing in this article shall restrict the right of a municipality or county to impose ad valorem taxes, service fees, sales taxes, or other taxes and fees lawfully imposed on other businesses within the municipality or county.

(G) The franchise fee allowed by this section is in lieu of a permit fee, encroachment fee, degradation fee, or other fee assessed on a holder of a state-issued certificate of franchise authority for its occupation of or work within the public rights-of-way with regard to a cable system.

Section 58-12-340. (A) A municipality or county may, upon reasonable written request but no more than once per year and only once with respect to any given period, review the business records of a cable service provider to the extent necessary to ensure payment of the franchise fee in accordance with Section 58-12-330. Within ninety days after receipt of a request by a county or municipality for business records pursuant to this subsection, a holder of a state-issued certificate of franchise authority must inform the requesting county or municipality of the status of the request. Thereafter, the parties must, upon request by either party, work in good faith to develop a mutually acceptable schedule for the provision of such records.

(B) No municipality, county, or holder of a state-issued certificate of franchise authority may bring any suit arising out of or relating to the amounts allegedly due to a municipality or county under Section 58-12-330, unless that entity has first initiated good-faith settlement discussions in accordance with the negotiation and mediation procedures set forth in subsection (C). All negotiations and mediation pursuant to this section must be confidential and must be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence and South Carolina Rules of Evidence.

(C) A municipality, county, or holder of a state-issued certificate of franchise authority shall give the other party written notice of any dispute not resolved in the normal course of business. At the request of the municipality or county, the parties shall participate in mediation governed by procedures established in the South Carolina Circuit Court Alternative Dispute Resolution Rules that are in effect at the time for the State or for any portion of the State. Representatives of both parties, with authority to settle the dispute, must meet at a mutually agreeable time and place within thirty calendar days after receipt of such notice, and thereafter as often as reasonably deemed necessary, to exchange relevant information and attempt to resolve the dispute. If the dispute has not been resolved within sixty calendar days after receipt of the notice, either the municipality or the county may initiate nonbinding mediation. The mediation must be conducted in accordance with the South Carolina Circuit Court Alternative Dispute Resolution Rules that are in effect at the time for the State or for any portion of the State and must take place at a mutually agreeable time and location.

(D) Any suit with respect to a dispute arising out of or relating to the amount of the franchise fee allegedly due to a municipality or county under Section 58-12-330 must be filed by the municipality or county seeking to recover an additional amount alleged to be due, or by the holder of a state-issued certificate of franchise authority seeking a refund of an alleged overpayment, in a court of competent jurisdiction within three years following the end of the quarter to which the disputed amount relates; provided, however, that the time period may be extended by written agreement between the holder of a state-issued certificate of franchise authority and a municipality or county. Good faith participation in and completion of the negotiation and mediation procedures set forth in subsection (C) shall be a condition precedent to proceeding with the suit beyond its filing to toll the limitations period set forth in this subsection.

(E) Each party shall bear its own costs incurred in connection with any and all of the activities and procedures set forth in this section. A municipality or county may not employ, appoint, or retain any person or entity for compensation that is dependent in any manner upon the outcome of any such audit, including, without limitation, the audit findings or the recovery of fees or other payment by the municipality or county. A person or entity may not solicit or accept compensation dependent in any manner upon the outcome of any such audit, including, without limitation, the audit findings or the recovery of fees or other payment by the municipality or county.

(F) A municipality or county may contract with a third party for the collection of the franchise fees and enforcement of the provisions of this chapter.

Section 58-12-350. No franchising authority, state agency, or political subdivision of the State may impose any cable system construction or cable service deployment build-out requirements on a holder of a state-issued certificate of franchise authority.

Section 58-12-360. The holder of a state-issued certificate of franchise authority must comply with all applicable federal customer service requirements. The South Carolina Department of Consumer Affairs must receive complaints from customers of the holder

of a state-issued certificate of franchise authority in accordance with Section 37-6-117. Contact information for the Department of Consumer Affairs must be printed on the customer's bill.

Section 58-12-370. (A) Not later than one hundred twenty days after a request by a municipality or county, the holder of a state-issued certificate of franchise authority shall provide each municipality or county in which it provides cable service with capacity in its network to allow PEG access channels for noncommercial programming consistent with this section.

(B) Except as otherwise provided in Section 58-12-310, the holder of a state-issued certificate of franchise authority shall provide the same number of PEG access channels a municipality or county has activated under the incumbent cable service provider's franchise agreement as of the date of the holder's application or amended application for a state-issued certificate of franchise authority. If a municipality or county did not have PEG access channels as of the date of the holder's application or amended application for a state-issued certificate of franchise authority, the cable service provider shall furnish, upon written request by that municipality or county, up to three PEG channels, one of which may be used by the municipality or county without restrictions relating to repeat programming. No cable service provider shall be required to provide more than three PEG access channels on its cable system. Municipalities, counties, and cable service providers must cooperate in the sharing of channel capacity to provide PEG access for municipalities and counties served by the cable system.

(C) Any PEG channel above the one unrestricted channel provided pursuant to this section that is not utilized by the municipality or county for at least eight hours a day may no longer be made available to the municipality or county but may be programmed at the cable service provider's discretion. At such time as the municipality or county can certify to the cable service provider a schedule for at least eight hours of daily programming, the cable service provider must restore the previously lost channel but is under no obligation to carry that channel on a basic or analog tier.

(D) If a municipality or county has not utilized the maximum number of additional access channels as permitted by subsection (B), access to the additional channel capacity allowed in subsection (B) may be provided upon a one-hundred-twenty-day request only if the municipality or county can demonstrate that all activated PEG channels are 'substantially utilized'. PEG channels must be considered 'substantially utilized' when eight hours are programmed on that channel each calendar day. In addition, at least forty percent of the eight hours of programming for each business day on average over each calendar quarter must be nonrepeat programming.

(E) The operation of any PEG access channel provided pursuant to this section is the responsibility of the municipality, the county, or the Educational Television Commission receiving the benefit of the channel, and the holder of a state-issued certificate of franchise authority bears only the responsibility for the transmission of the channel. The holder of a state-issued certificate of franchise authority must be responsible for

providing the connectivity to each PEG access channel distribution point up to the first two hundred feet.

(F) The municipality, the county, or the Educational Television Commission shall ensure that all transmissions of content and programming provided by or arranged by them to be transmitted over a PEG channel by a holder of a state-issued certificate of franchise authority are provided and submitted to the cable service provider in a manner or form that is capable of being accepted and transmitted by the provider over its network without further alteration or change in the content or transmission signal, and which is compatible with the technology or protocol utilized by the cable service provider to deliver its cable services.

(G) Where technically feasible, the holder of a state-issued certificate of franchise authority and an incumbent cable service provider must use reasonable efforts to interconnect their cable systems on mutually acceptable and reasonable terms for the purpose of providing PEG programming. Interconnection may be accomplished by direct cable microwave link, satellite, or other reasonable method of connection. Holders of a state-issued certificate of franchise authority and incumbent cable service providers shall negotiate in good faith, and incumbent cable service providers may not unreasonably withhold interconnection of PEG channels.

(H) A holder of a state-issued certificate of franchise authority is not required to interconnect for, or otherwise to transmit, PEG content that is branded with the logo, name, or other identifying marks of another cable service provider, and a municipality or county may require a cable service provider to remove its logo, name, or other identifying marks from PEG content that is to be made available to another provider.

Section 58-12-380. (A) A cable service provider that has been granted a state-issued certificate of franchise authority may not deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides.

(B) For purposes of determining whether a holder of a state-issued certificate of franchise authority has violated Section 58-12-380(A), cost, density, distance, and technological or commercial limitations must be taken into account, and the holder of the state-issued certificate shall have a reasonable time to deploy its service. Use of alternative technologies that provide different or comparable content, service, and functionality may not be considered a violation of this section. The inability to serve a potential residential subscriber because a holder of a state-issued certificate of franchise authority is prohibited from placing its own facilities in a building or property may not be found to be a violation of this section. This section may not be construed as authorizing any build-out requirements on a holder of a state-issued certificate of franchise authority.

(C) Any potential residential subscriber or group of residential subscribers within a municipality or county described pursuant to Section 58-12-310(B)(2) who believe they are being denied access to services in violation of subsection (A) may file a complaint

with the Secretary of State, along with a clear statement of the facts and the information supporting the complaint. At the request of the potential residential subscriber or group of residential subscribers, the parties shall participate in mediation governed by procedures established in the South Carolina Circuit Court Alternative Dispute Resolution Rules that are in effect at the time for the State or for any portion of the State. If requested by the Secretary of State, the Attorney General must investigate the allegations contained in a complaint filed pursuant to this section, assist the Secretary of State in the preparation of a written determination required by this section, and represent the Secretary of State in any proceeding instituted pursuant to this section. Upon receipt of any such complaint, the Secretary of State or the Attorney General acting on behalf of the Secretary of State shall serve a copy of the complaint and supporting materials upon the subject cable service provider, which shall have sixty days after receipt of such information to submit a written answer and any other relevant information the provider wishes to submit to the Secretary of State in response to the complaint. If, after investigation of the allegations contained in the complaint, the Secretary of State determines based on the information submitted or gathered pursuant to such process that a material violation of subsection (A) has occurred, the Secretary of State or the Attorney General acting on behalf of the Secretary of State shall issue a written determination setting forth the basis for such findings and giving the cable service provider a reasonable time to cure such violation. If the cable service provider fails to cure such violation within the time permitted in the written determination, the Secretary of State may seek enforcement of the terms of the written determination in the circuit courts of this State or in any federal court of competent jurisdiction. A cable service provider that is found by the Secretary of State to be in violation of subsection (A) may challenge that determination in the circuit courts of this State or in any federal court of competent jurisdiction.

(D) The Secretary of State must not withhold or deny an application for franchise authority due to an alleged violation of subsection (A).

Section 58-12-390. Should the holder of a state-issued certificate of franchise authority be found by a court of competent jurisdiction to be in noncompliance with the requirements of this article, the court must order the holder of the state-issued certificate of franchise authority, within a specified reasonable period of time, to cure the noncompliance.

Section 58-12-395. Nothing in this article affects the ability of a county or municipality to carry out its emergency preparedness responsibilities pursuant to Section 25-1-450(2) or its emergency alert system responsibilities pursuant to 47 CFR Part 11.

Section 58-12-400. (A) The following sections of Article 2, Chapter 12, Title 58 shall apply to a cable service provider who has been granted a state-issued certificate of franchise authority under this article: Sections 58-12-20, 58-12-30(d) and (f), 58-12-60, 58-12-70, 58-12-110, and 58-12-130(A) and (C).

(B) In addition to the above, each holder of a state-issued certificate of franchise authority must make available one six megahertz channel if it is using analog

transmission technology to deliver local broadcast television programming to subscribers over its network, or one standard digital channel if it is using digital technology for such purpose, for the transmissions of the Educational Television Commission.

(C) The following sections of Article 2, Chapter 12 of Title 58 shall not apply to a cable service provider who has been granted a state-issued certificate of franchise authority: Sections 58-12-10, 58-12-30(a), (b), (c), and (e), 58-12-40, 58-12-50, 58-12-80, 58-12-90, 58-12-100, 58-12-120, and 58-12-130(B)."

SECTION 5. If any section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, items, subitems, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 6. This act takes effect upon approval by the Governor.

VIRGINIA ACTS OF ASSEMBLY -- 2006 SESSION

CHAPTER 76

An Act to amend and reenact §§ 2.2-3705.6, 15.2-2160, 56-265.4:4, 56-466.1, and 56-502 of the Code of Virginia, to amend the Code of Virginia by adding in Chapter 21 of Title 15.2 an article numbered 1.2, consisting of sections numbered 15.2-2108.19 through 15.2-2108.31, and to repeal § 15.2-2108 of the Code of Virginia, relating to licensing and regulation of cable television systems.

[H 1404]

Approved March 10, 2006

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3705.6, 15.2-2160, 56-265.4:4, 56-466.1, and 56-502 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Chapter 21 of Title 15.2 an article numbered 1.2, consisting of sections numbered 15.2-2108.19 through 15.2-2108.31, as follows:

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-132.4 or 62.1-134.1.

2. Financial statements not publicly available filed with applications for industrial development financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.

3. Confidential proprietary records, voluntarily provided by private business pursuant to a promise of confidentiality from the Department of Business Assistance, the Virginia Economic Development Partnership, the Virginia Tourism Authority, or local or regional industrial or economic development authorities or organizations, used by the Department, the Partnership, the Authority, or such entities for business, trade and tourism development; and memoranda, working papers or other records related to businesses that are considering locating or expanding in Virginia, prepared by such entities, where competition or bargaining is involved and where, if such records are made public, the financial interest of the governmental unit would be adversely affected.

4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-239 et seq.), as such Act existed prior to July 1, 1992.

5. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § 28.2-204.

6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration.

7. Confidential proprietary records related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy contingency planning purposes or for developing consolidated statistical information on energy supplies.

8. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1.

9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration. However, the exemption provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.

10. Confidential information designated as provided in subsection D of § 2.2-4342 as trade secrets or proprietary information by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

11. Confidential proprietary records that are voluntarily provided by a private entity pursuant to a proposal filed with a public entity or an affected local jurisdiction under the Public-Private

Transportation Act of 1995 (§ 56-556 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), pursuant to a promise of confidentiality from the responsible public entity or affected local jurisdiction, used by the responsible public entity or affected local jurisdiction for purposes related to the development of a qualifying transportation facility or qualifying project; and memoranda, working papers or other records related to proposals filed under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002, where, if such records were made public, the financial interest of the public or private entity involved with such proposal or the process of competition or bargaining would be adversely affected. In order for confidential proprietary information to be excluded from the provisions of this chapter, the private entity shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary. For the purposes of this subdivision, the terms "affected local jurisdiction," "public entity" and "private entity" shall be defined as they are defined in the Public-Private Transportation Act of 1995 or in the Public-Private Education Facilities and Infrastructure Act of 2002. However, nothing in this subdivision shall be construed to prohibit the release of procurement records as required by § 56-573.1 or 56-575.16. Procurement records shall not be interpreted to include proprietary, commercial or financial information, balance sheets, financial statements, or trade secrets that may be provided by the private entity as evidence of its qualifications.

12. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected, and, after June 30, 1997, where such information was provided pursuant to a promise of confidentiality.

13. Confidential proprietary records that are provided by a franchisee under ~~§ 15.2-2108~~ *Article 1.2 (§ 15.2-2108.19 et seq.) of Chapter 21 of Title 15.2* to its franchising authority pursuant to a promise of confidentiality from the franchising authority that relates to the franchisee's potential provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such records were made public, the competitive advantage or financial interests of the franchisee would be adversely affected. In order for confidential proprietary information to be excluded from the provisions of this chapter, the franchisee shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reason why protection is necessary.

14. Documents and other information of a proprietary nature furnished by a supplier of charitable gaming supplies to the Department of Charitable Gaming pursuant to subsection E of § 18.2-340.34.

15. Records and reports related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to §§ 3.1-622 and 3.1-624.

16. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1, submitted by CMRS providers as defined in § 56-484.12 to the Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to § 56-484.15, relating to the provision of wireless E-911 service.

17. Records submitted as a grant application, or accompanying a grant application, to the Commonwealth Health Research Board pursuant to Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical or scholarly issues, when such information has not been publicly released, published, copyrighted or patented, if the disclosure of such information would be harmful to the competitive position of the applicant.

18. Confidential proprietary records and trade secrets developed and held by a local public body (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable television services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter ~~2~~ *21* of Title 15.2, to the extent that disclosure of such records would be harmful to the competitive position of the locality. In order for confidential proprietary information or trade secrets to be excluded from the provisions of this chapter, the locality in writing shall (i) invoke the protections of this subdivision, (ii) identify with specificity the records or portions thereof for which protection is sought, and (iii) state the reasons why protection is necessary.

19. Confidential proprietary records and trade secrets developed by or for a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) to provide qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 et seq.) of Chapter 15 of Title 56, where disclosure of such information would be harmful to the competitive position of the authority, except that records required to be maintained in accordance with § 15.2-2160 shall be released.

Article 1.2.
Licensing and Regulation of Cable Television Systems.

§ 15.2-2108.19. Definitions.

As used in this article:

"Act" means the Communications Act of 1934.

"Affiliate", in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.

"Basic service tier" means the service tier that includes (i) the retransmission of local television broadcast channels and (ii) public, educational, and governmental channels required to be carried in the basic tier.

"Cable operator" means any person or group of persons that (i) provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system or (ii) otherwise controls or is responsible for, through any arrangement, the management and operation of a cable system. Cable operator does not include a provider of wireless or direct-to-home satellite transmission service.

"Cable service" means the one-way transmission to subscribers of (i) video programming or (ii) other programming service, and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service. Cable service does not include any video programming provided by a commercial mobile service provider defined in 47 U.S.C. § 332(d).

"Cable system" or "cable television system" means any facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service that includes video programming and that is provided to multiple subscribers within a community, except that such definition shall not include (i) a system that serves fewer than 20 subscribers; (ii) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (iii) a facility that serves only subscribers without using any public right-of-way; (iv) a facility of a common carrier that is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, 47 U.S.C. § 201 et seq., except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (v) any facilities of any electric utility used solely for operating its electric systems; (vi) any portion of a system that serves fewer than 50 subscribers in any locality, where such portion is a part of a larger system franchised in an adjacent locality; or (vii) an open video system that complies with § 653 of Title VI of the Communications Act of 1934, as amended, 47 U.S.C. § 573.

"Certificated provider of telecommunications services" means a person holding a certificate issued by the State Corporation Commission to provide local exchange telephone service.

"Franchise" means an initial authorization, or renewal thereof, issued by a franchising authority, including a locality or the Commonwealth Transportation Board, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, that authorizes the construction or operation of a cable system, a telecommunications system, or other facility in the public rights-of-way. A negotiated cable franchise is granted by a locality after negotiation with an applicant pursuant to § 15.2-2108.20. An ordinance cable franchise is granted by a locality when an applicant provides notice pursuant to § 15.2-2108.21 that it will provide cable service in the locality.

"Force majeure" means an event or events reasonably beyond the ability of cable operator to anticipate and control. "Force majeure" includes, but is not limited to, acts of God, incidences of terrorism, war or riots, labor strikes or civil disturbances, floods, earthquakes, fire, explosions, epidemics, hurricanes, tornadoes, governmental actions and restrictions, work delays caused by waiting for utility providers to service or monitor or provide access to utility poles to which cable operator's facilities are attached or to be attached or conduits in which cable operator's facilities are located or to be located, and unavailability of materials or qualified labor to perform the work necessary.

"Gross revenue" means all revenue, as determined in accordance with generally accepted accounting principles, that is actually received by the cable operator and derived from the operation of the cable system to provide cable services in the franchise area; however, in an ordinance cable franchise "gross revenue" shall not include: (i) refunds or rebates made to subscribers or other third parties; (ii) any revenue which is received from the sale of merchandise over home shopping channels carried on the cable system, but not including revenue received from home shopping channels for the use of the cable service to sell merchandise; (iii) any tax, fee, or charge collected by the cable operator and remitted to a governmental entity or its agent or designee, including without limitation a local public access or education group; (iv) program launch fees; (v) directory or Internet advertising revenue including, but not limited to, yellow page, white page, banner advertisement, and electronic publishing; (vi) a sale of cable service for resale or for use as a component part of or for the integration into cable services to be resold in the ordinary course of business, when the reseller is required to pay or collect franchise fees or similar fees on the resale of the cable service; (vii) revenues received by any affiliate or any other person in exchange for supplying goods or services used by the cable operator to provide cable

service; and (viii) revenue derived from services classified as noncable services under federal law, including, without limitation, revenue derived from telecommunications services and information services, and any other revenues attributed by the cable operator to noncable services in accordance with rules, regulations, standards, or orders of the Federal Communications Commission.

"Interactive on-demand services" means a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider.

"Ordinance" includes a resolution.

"Transfer" means any transaction in which (i) an ownership or other interest in the cable operator is transferred, directly or indirectly, from one person or group of persons to another person or group of persons, so that majority control of the cable operator is transferred; or (ii) the rights and obligations held by the cable operator under the cable franchise granted under this article are transferred or assigned to another person or group of persons. However, notwithstanding clauses (i) and (ii) of the preceding sentence, a transfer of the cable franchise shall not include (a) transfer of an ownership or other interest in the cable operator to the parent of the cable operator or to another affiliate of the cable operator; (b) transfer of an interest in the cable franchise granted under this article or the rights held by the cable operator under the cable franchise granted under this article to the parent of the cable operator or to another affiliate of the cable operator; (c) any action that is the result of a merger of the parent of the cable operator; (d) any action that is the result of a merger of another affiliate of the cable operator; or (e) a transfer in trust, by mortgage, or by assignment of any rights, title, or interest of the cable operator in the cable franchise or the system used to provide cable in order to secure indebtedness.

"Video programming" means programming provided by, or generally considered comparable to, programming provided by a television broadcast station.

All terms used herein, unless otherwise defined, shall have the same meaning as set forth in Title VI of the Communications Act of 1934, 47 U.S.C. § 521 et seq. In addition, references in this article to any federal law shall include amendments thereto as are enacted from time-to-time.

§ 15.2-2108.20. Authority to grant negotiated cable franchises and regulate cable systems.

A. A locality may grant a negotiated cable franchise in accordance with Title VI of the Communications Act of 1934, as amended, 47 U.S.C. § 521 et seq., and this chapter.

B. A locality may, by ordinance, exercise all regulatory powers over cable systems granted by the Communications Act of 1934, except as limited by this article. These regulatory powers shall include the authority: (i) to enforce customer service standards in accordance with the Act; (ii) to enforce more stringent standards as agreed upon by the cable operator through the terms of a negotiated cable franchise; and (iii) to regulate the rates for basic cable service in accordance with the Act. A locality, however, shall not regulate cable operators, cable systems, or other facilities used to provide video programming through the adoption of ordinances or regulations (a) that are more onerous than ordinances or regulations adopted for existing cable operators; (b) that unreasonably prejudice or disadvantage any cable operator, whether existing or new; or (c) that are inconsistent with any provision of federal law or this article.

§ 15.2-2108.21. Ordinance cable franchises.

A. This section shall govern the procedures by which a locality may grant ordinance cable franchises.

B. An ordinance cable franchise, which shall have a term of 15 years, may be requested by (i) a certificated provider of telecommunications services with previous consent to use the public rights-of-way in a locality through a franchise; (ii) a certificated provider of telecommunications services that lacked previous consent to provide cable service in a locality but provided telecommunications services over facilities leased from an entity having previous consent to use of the public rights-of-way in such locality through a franchise; or (iii) a cable operator with previous consent to use the public rights-of-way to provide cable service in a locality through a franchise and who seeks to renew its existing cable franchise pursuant to § 15.2-2108.30 as an ordinance cable franchise. A cable operator with previous consent to use the public rights-of-way to provide cable service in a locality through a franchise may opt into the new terms of an ordinance cable franchise under § 15.2-2108.26.

C. In order to obtain an ordinance cable franchise, an applicant shall first file with the chief administrative officer of the locality from which it seeks to receive such ordinance cable franchise a request to negotiate the terms and conditions of a negotiated cable franchise under § 15.2-2108.20. An applicant shall request and make itself available to participate in cable franchise negotiations with the locality from which it seeks to receive negotiated cable franchise at least 45 calendar days prior to filing a notice electing an ordinance cable franchise; this prerequisite shall not be applicable if a locality refuses to engage in negotiations at the request of an applicant or if the applicant already holds a negotiated cable franchise from the locality. Thereafter, an applicant, through its president or chief executive officer, shall file notice with the locality that it elects to receive an ordinance cable franchise at least 30 days prior to offering cable in such locality. The notice shall be accompanied by a map or a

boundary description showing (i) the initial service area in which the cable operator intends to provide cable service in the locality within the three-year period required for an initial service area and (ii) the area in the locality in which the cable operator has its telephone facilities. The map or boundary description of the initial service areas may be amended by the cable operator by filing with the locality a new map or boundary description of the initial service area.

D. The cable operator shall assure that access to cable services is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides. The local franchising authority shall have the right to monitor and inspect the deployment of cable services and the cable operator shall submit semiannual progress reports detailing the current provision of cable services in accordance with the deployment schedule and its new service area plans for the next six months. The failure to correct or remedy any material deficiencies shall be subject to the same remedies as contained in the cable television franchise of the existing cable operator as that franchise existed at the time of the grant of the ordinance franchise.

E. The locality from which the applicant seeks to receive an ordinance cable franchise shall adopt any ordinance requiring adoption under this article within 120 days of the applicant filing the notice required in subsection C. Any ordinance adopted under this section that relates to a cable operator's provision of cable service shall apply to such cable operator retroactively to the date on which the cable operator began to offer cable service in the locality pursuant to this article.

F. Notice of any ordinance that requires a public hearing shall be advertised once a week for two successive weeks in a newspaper having general circulation in the locality. The advertisement shall include a statement that a copy of the full text of the ordinance is on file in the office of the clerk of the locality. All costs of such advertising shall be assessed against the operator or applicant.

G. If the governing body of any town adopts an ordinance pursuant to the provisions of this article, such town shall not be subject to any ordinance adopted by the county within which such town lies.

§ 15.2-2108.22. Regulation of fees, rates and services; penalties.

Upon receiving a notice requesting an ordinance cable franchise pursuant to § 15.2-2108.21, a locality shall adopt or maintain one or more ordinances that govern a cable operator who provides cable service under an ordinance cable franchise. The requirements of any specific provision in any such ordinance shall not exceed the requirements imposed in the same provision, if any, in any existing cable franchise within the locality. Such ordinance or ordinances, which shall be adopted after a public hearing, shall:

1. Require a cable operator to provide the locality with access to a number of public, educational, and governmental access channels, equal to the lowest number of such channels provided by any other cable operator in the same franchise area of the locality. If the existing cable operator provides less than three such public, educational, and governmental access channels pursuant to a franchise agreement, the locality may require each cable operator to provide up to three such channels. Any additional channels provided subject to this provision shall be subject to the reclamation formula set forth below. In addition, a locality may, by ordinance adopted after a public hearing, require a cable operator to interconnect with any other cable operator to ensure the carriage of required public, educational, and governmental access channels; if the new cable operator and all existing cable operators cannot agree to an interconnection agreement within 180 days of a request to interconnect by the new cable operator, then the locality is authorized to determine an interconnection point. The locality or its designee shall assume responsibility for management, operation, and programming of such channels. A locality that substantially utilizes its existing public, educational, and governmental access channels may require a reasonable number of additional public, educational, and governmental access channels by the enactment of an ordinance, after a public hearing, so long as (i) the ordinance applies equally to all providers of cable service within a franchise area, (ii) the total number of additional public, educational, and governmental access channels does not exceed three channels in the basic service tier, and (iii) the total number of public, educational, and governmental access channels shall not exceed seven channels in the aggregate. Notwithstanding the foregoing, but consistent with federal law, the locality and a cable operator may enter into written agreements for the carriage of additional public, educational, and governmental access channels, including other arrangements for the carriage of such programming. Any additional public, educational, and governmental access channel provided pursuant to this article that is not utilized by the locality for at least eight hours a day shall no longer be made available to the locality, but may be programmed at the cable operator's discretion. At such time as the locality can certify to the cable operator a schedule for at least eight hours of daily programming for a period of three months, the cable operator shall restore the previously re-allocated channel. For purposes of this subdivision, a public, educational, and governmental access channel shall be considered to be substantially utilized when 12 hours are programmed on that channel each calendar day; in addition, at least 33% of the 12 hours of programming for each business day on average over each calendar quarter must be nonrepeat programming. For purposes of this subdivision, nonrepeat programming shall include the first three videocastings of a program and shall include programming on other public, educational, and governmental access channels in that locality. Programming for purposes of determining substantial utilization shall not include an alphanumeric scroll, except that for purposes

of requiring one or more additional public, educational, and governmental access channels, an alphanumeric scroll shall be included as programming on not more than one channel;

2. Require a cable operator to pay a franchise fee, remitted on the same schedule as the least frequent schedule of an existing cable operator, but no more frequently than quarterly, calculated by multiplying a franchise fee percentage rate by the cable operator's gross revenues in such franchise area for the remittance period; however, the franchise fee rate shall (i) not exceed 5% of such gross revenues and (ii) not exceed the lowest franchise fee rate paid or provided by an existing cable operator in the locality. The locality may further require that the cable operator make the franchise fee payments to the locality no later than 45 days following the end of the remittance period and require that the franchise fee payment be submitted with a brief report prepared by a duly authorized representative of the cable operator showing the basis for the computation. The locality shall have the right to reasonably require further supporting information that does not exceed the information required to be provided by existing cable operators in the locality;

3. Require a cable operator to pay a recurring fee, hereafter referred to as the PEG Capital Fee, to support the capital costs of public, educational, and governmental channel facilities, including institutional networks, provided that the PEG Capital Fee is equal to the lowest recurring fee imposed on a per subscriber or a percentage of gross revenue basis and paid by any existing cable operator in the locality to support the capital costs of such facilities. The PEG Capital Fee shall only be imposed on a per subscriber or a percentage of gross revenue basis. If the existing cable operator has paid a lump sum capital grant at award or renewal of its current franchise, or is providing in-kind equipment in lieu of such a capital grant, to support public, educational, and governmental channel facilities, including institutional networks, the locality, by ordinance adopted after a public hearing, shall also impose an additional monthly recurring fee to be known as the PEG Capital Grant Surcharge Fee on the new cable operator equal to the lower of (i) 1.5% of the new cable operator's gross revenues derived from the operation of its cable system in that locality or (ii) the lowest amount of capital contribution paid or provided in-kind, as shown on the books of the cable operator, by an existing cable operator in the locality (a) when such capital contribution is amortized over the term of the existing cable operator's franchise and (b) divided by the number of subscribers or annual gross revenue of the existing cable operator as shown on its most recent report to the locality, depending on recovery methodology chosen by the locality. Both the PEG Capital Fee and the PEG Capital Grant Surcharge Fee may only be collected by the locality for the remainder of the shortest remaining franchise term of any existing cable operator in the locality; however, at the end of such term the locality may negotiate with all cable operators to set a new, recurring fee to support the reasonable and necessary capital costs of public, educational, and governmental channel facilities, including institutional networks, that shall be imposed on all cable operators such that the fee applies equally to all of the customers of all cable operators in the locality. At the end of such term, no cable operator shall be required to provide any further in-kind public, educational, and governmental access channels, including institutional network, support. If the cable operators and the locality cannot agree on such a recurring capital cost fee, the locality, by ordinance adopted after a public hearing, may impose a recurring fee, calculated on a per subscriber or percentage of gross revenue basis, to support the reasonable and necessary capital costs of public, educational, and governmental channel facilities, including institutional networks; however, such fee may not exceed the PEG Capital Fee previously imposed on cable operators by the locality. Any and all fees permitted under this subdivision shall be paid by the cable operator to the locality on the same schedule as franchise fees are paid. Nothing in this subdivision shall be construed to permit a locality to require cable operators to pay capital grants at the time of the grant or renewal of a franchise or otherwise except for the PEG Capital Grant Surcharge Fee specifically provided in this subdivision;

4. Require a cable operator to comply with the customer service requirements imposed by the locality pursuant to 47 U.S.C. § 552(a)(1) and this article through the adoption of an ordinance after a public hearing. Any customer service requirements imposed by the locality that exceed the requirements established by the Federal Communications Commission under 47 U.S.C. § 552(b) shall (i) not be designed so that the cable operator cannot also comply with any other customer service requirements under state or federal law or regulation applicable to the cable operator in its provision of other services over the same network used to provide cable service, (ii) be no more stringent than the customer service requirements applied to other cable operators in the franchise area, and (iii) be reasonably tailored to achieve appropriate customer service goals based on the technology used by the cable operator to provide cable service;

5. Adopt procedures by which it will enforce the provisions of this article and the applicable mandatory requirements of 47 U.S.C. §§ 521-573 and the regulations promulgated thereunder. Such procedures shall require the locality to: (i) informally discuss the matter with the cable operator in the event that the locality believes that a cable operator has not complied with this article or the applicable mandatory requirements of 47 U.S.C. §§ 521-573 and (ii) notify the cable operator in writing of the exact nature of the alleged noncompliance if the discussions described in the foregoing clause (i) do not lead to resolution of the alleged noncompliance. The cable operator shall have 15 days from receipt of

this written notice to: (a) respond to the locality, if the cable operator contests, in whole or in part, the assertion of noncompliance; (b) cure such default; or (c) in the event that, by the nature of default, such default cannot be cured within the 15-day period, initiate reasonable steps to remedy such default and notify the locality of the steps being taken and the projected date that they will be completed. The locality shall schedule a public hearing in the event that the cable operator fails to respond to the written notice pursuant to these procedures or in the event that the alleged default is not remedied within 30 days of the date projected above if the locality intends to continue its investigation into the default. The locality shall provide the cable operator at least 30 business days prior written notice of such hearing, which will specify the time, place, and purpose of such hearing, and provide the cable operator the opportunity to be heard;

6. Adopt a schedule of uniform penalties or liquidated damages that it may impose upon any cable operator with an ordinance cable franchise when the locality determines that the cable operator has failed to materially comply with (i) customer service standards; (ii) carriage of public, educational, and governmental channels; (iii) reporting requirements; or (iv) timely and full payment of the franchise fee or the fee assessed for the provision of public, educational, or governmental access channels, including institutional networks. Any penalty or liquidated damage for any of the foregoing violations shall be the same penalty or liquidated damage already established for a cable operator in the same franchise area, if any. In addition, a locality shall not impose any penalty or liquidated damage adopted pursuant to this subdivision until the cable operator has been afforded a reasonable cure period between the time the cable operator is notified of the violation and the penalty or liquidated damage is imposed. A separate violation for purposes of this article and the ordinances passed to implement this article as it pertains to customer service standards shall be deemed to occur whenever the locality reasonably determines that a separate customer service standard violation has occurred on one day; however, the cable operator shall not be charged with multiple violations for a single act or event affecting one or more subscribers on the same day. The locality may charge interest at the legal rate as set forth in § 6.1-330.53 for any amounts due the locality by the cable operator in clause (iv) of this subdivision that remain unpaid and undisputed;

7. Adopt procedures under which the locality may inspect and audit, upon 30 days prior written notice, the books and records of the cable operator and recompute any amounts determined to be payable under the ordinances adopted pursuant to this article. The procedures adopted by the locality shall not exceed the following requirements: (i) the locality may require the cable operator to make available to the locality all records reasonably necessary to confirm the accurate payment of fees; (ii) the locality may require the cable operator to bear the locality's reasonable out-of-pocket audit expenses if the audit discloses an underpayment of more than 3% of any quarterly payment, but not less than $5,000; (iii) the locality may require the cable operator to pay any additional undisputed amounts due to the locality as a result of the audit within 30 days following written notice by the locality to the cable operator; (iv) in the event the cable operator disputes any underpayment discovered as the result of an audit conducted by the locality, the locality shall work together with the cable operator in good faith to promptly resolve such dispute; (v) the locality shall provide that the cable operator and the locality maintain all rights and remedies available at law regarding any disputed amounts; (vi) the locality shall have no more than three years from the time the cable operator delivers a payment to provide a written, detailed objection to or dispute of that payment, and if the locality fails to object to or dispute the payment within that time period, the locality shall be barred from objecting to or disputing it after that time period; and (vii) the locality shall not audit a cable operator more frequently than every 24 months;

8. Adopt reasonable reporting requirements for annual financial information and quarterly customer service information that must be provided by a cable operator to the locality so long as such information does not exceed the reporting requirements for any existing cable operator in that locality;

9. Require cable operators to provide, without charge, within the area actually served by the cable operator, one cable service outlet activated for basic cable service to each fire station, public school, police station, public library, and any other local government building. The ordinance shall apply equally to all providers of cable services in the locality, but shall not apply in cases where it is not technically feasible for a cable operator to comply;

10. Subject to § 15.2-2108.24, adopt requirements and procedures for (i) the management of the public rights-of-way that do not exceed the standards set forth in clauses (i) and (ii) of subsection C of § 56-462 and (ii) the construction of a cable system in the public rights-of-way;

11. Adopt the following allocation procedure if cable services subject to a franchise fee, or any other fee determined by a percentage of the cable operator's gross revenues in a locality, are provided to subscribers in conjunction with other services: the fee shall be applied only to the value of these cable services, as reflected on the books and records of the cable operator in accordance with rules, regulations, standards, or orders of the Federal Communications Commission or the State Corporation Commission, or generally accepted accounting principles. Any discounts resulting from purchasing the services as a bundle shall be reasonably allocated between the respective services that constitute the bundled transaction; and

12. Require cable operators to make cable service available to (i) up to all of the occupied residential dwelling units in the initial service area selected by cable operator within no less than three years of the date of the grant of the franchise and (ii) no more than 65% of the residential dwelling units in the area in the locality in which the cable operator has its telephone facilities, within no less than seven years of the date of the grant of the franchise. Notwithstanding the foregoing provision, a cable operator shall not be required to make cable service available: (a) for periods of force majeure; (b) for periods of delay caused by the locality; (c) for periods of delay resulting from the cable operator's inability to obtain authority to access rights-of-way in the service area; (d) in areas where developments or buildings are subject to claimed exclusive arrangements; (e) in developments or buildings that the cable operator cannot access under industry standard terms and conditions after good faith negotiation; (f) in developments or buildings that the cable operator is unable to provide cable service for technical reasons or that require facilities that are not available or cannot be deployed on a commercially reasonable basis; (g) in areas where it is not technically feasible to provide cable service due to the technology used by the cable operator to provide cable service; (h) in areas where the average occupied residential household density is less than 30 occupied residential dwelling units per mile as measured in strand footage from the nearest technically feasible point on the cable operator's active cable system (or such higher average density number as may be contained in an existing cable operator's cable franchise); and (i) when the cable operator's prior service, payment, or theft of service history with a subscriber or potential subscriber has been unfavorable. Should, through new construction, an area within the cable operator's service area meet the density requirement, a cable operator shall, subject to the exclusions in this subdivision, provide cable service to such area within six months of receiving notice from the locality that the density requirements have been met. A locality may not require a cable operator using its telephone facilities to provide cable service to provide any cable service outside of the area in the locality in which the cable operator has its telephone facilities. During the 12-month period commencing after the seventh-year anniversary date of the grant of the franchise, a locality may, by ordinance adopted after a public hearing in which the locality specifically finds that such a requirement is necessary to promote competition in cable services within the locality, require the cable operator to make service available to no more than 80% of the residential dwelling units in the area in the locality in which the cable operator has its telephone facilities within no less than 10 years of the date of the grant of the franchise, subject to the exclusions in clauses (a) through (i) of this subdivision. If the cable operator notifies the locality that it is unwilling to accept this additional service availability requirement, the locality may, after notice and public hearing, terminate the cable operator's ordinance cable franchise. The cable operator shall file a certificate at its third and seventh, and if applicable, tenth, anniversary dates certifying its compliance with the foregoing service requirements. For purposes of an ordinance cable franchise, the date of the grant of the franchise shall be the date the notice required by § 15.2-2108.21 is filed with the locality. For purposes of a negotiated cable franchise, the date of the grant of the franchise shall be the date the respective locality has granted a negotiated cable franchise pursuant to § 15.2-2108.20.

§ 15.2-2108.23. Regulation of rights-of-way; fees.

A. To the extent that a franchised cable operator has been authorized to use the public rights-of-way in a locality and is obligated to pay a franchise fee to such locality, such cable operator shall not be subject to any occupancy, use, or similar fee, with respect to its use of such rights-of-way, by the locality or the Commonwealth Transportation Board except to the extent that such cable operator is also a certificated provider of telecommunications services and subject to the public rights-of-way use fee under § 56-468.1. The Commonwealth Transportation Board may charge, on a nondiscriminatory basis, fees to recover the approximate actual cost incurred for the issuance of a permit to perform work within the rights-of-way and for inspections to ensure compliance with the conditions of the permit, as such fees shall be established by regulations adopted under the Administrative Process Act (§ 2.2-4000 et seq.); however, such fees may not apply to certificated providers of telecommunications services except to the extent permitted under §§ 56-458, 56-462, and 56-468.1.

B. A locality may charge, on a nondiscriminatory basis, fees to recover the approximate actual cost incurred for the issuance of a permit to perform work within the rights-of-way and for inspections to ensure compliance with the conditions of the permit, as such fees existed on February 1, 1997, or as subsequently modified by ordinance; however, such fees may not apply to certificated providers of telecommunications services except to the extent permitted under §§ 56-458, 56-462, and 56-468.1. The limitation as to fees charged for the use of the public rights-of-way shall not be applicable to pole attachments and conduit occupancy agreements between a franchised cable operator and a locality or its authority or commission, which permits such operator to use the public poles or conduits.

C. Except as provided in §§ 56-458, 56-462, and 56-468.1 and in any rules adopted by the Commonwealth Transportation Board under § 33.1-12, the cable franchise granted hereunder supersedes and replaces any and all other requirements and fees in local laws and the laws of the Commonwealth relating to the use of the public rights-of-way by a cable system or other facilities for the provision of cable service, whether such other authorizations are designated as franchises, permits, consents, ordinances, or otherwise. No cable operator that is (i) a certificated provider of telecommunications

services that has previous consent to use the public rights-of-way in a locality through a franchise or (ii) a certificated provider of telecommunications services that lacked prior consent to provide cable service in a locality but provided telecommunications service over facilities leased from an entity having previous consent to use the public rights-of-way in such locality through a franchise and granted a franchise and paying fees pursuant to this section shall be required, in order to develop or operate a cable system or other facilities to provide video services, to (a) obtain consent in accordance with §§ 15.2-2015 through 15.2-2017, 56-458 or 56-462, except for permits or other permission to open streets and roads, or (b) submit bids, bonds or applications in accordance with §§ 15.2-2100 through 15.2-2105, except for reasonable performance bonds or letters of credit not in excess of $50,000. The restrictions in §§ 15.2-2015 through 15.2-2018, 15.2-2100 through 15.2-2105, 15.2-2106 and 15.2-2107, including but not limited to the advertisement and receipt of bids for franchises, shall not apply to a cable system or other facilities used to provide cable services by cable operator that is a certificated provider of telecommunications services with previous consent to use the public rights-of-way in a locality through a franchise, including the provision of telecommunications services over facilities leased from an entity with previous consent to use the public rights-of-way in a locality through a franchise, but without previous consent to provide cable service in that locality.

§ 15.2-2108.24. Regulation of facility construction or rights-of-way management requirements for certain cable operators.

A locality shall not impose through a franchise to provide cable service, whether by negotiation or by ordinance, any facility construction or rights-of-way management requirements on a cable operator that is (i) a certificated provider of telecommunications services that has a franchise to use the public rights-of-way in a locality or (ii) a certificated provider of telecommunications services that lacked prior consent to provide cable service in a locality but provided telecommunications services over facilities leased from an entity having a franchise to use the public rights-of-way in such locality, except that a municipality must meet the requirements of Article 1.1 (§ 15.2-2108.2 et seq.) of this chapter or otherwise be authorized to provide cable service.

§ 15.2-2108.25. Itemization.

A cable operator providing cable service may identify as a separate line item on each regular bill of each subscriber (i) the amount of the total bill assessed as a franchise fee, or any equivalent fee, and the locality to which such fee is paid; (ii) the amount of the total bill assessed to satisfy any requirements imposed on the cable operator, including those to support public, educational, or governmental access facilities, including institutional networks; and (iii) the amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental entity on the transaction between the cable operator and the subscriber.

§ 15.2-2108.26. Reciprocity.

Upon the request by an existing cable operator in the locality, a locality that has negotiated and granted a cable franchise to a new cable provider through negotiation, whether before or after July 1, 2006, shall make available to that existing cable operator the applicable terms and conditions that such locality provides to a new cable operator, by an amendment and restatement in lieu of its existing franchise document. In addition, upon the request by an existing cable operator in the locality, a locality adopting an ordinance under this article shall make available to that existing cable operator the applicable terms and conditions from any such ordinance by opting into an ordinance cable franchise. In either such event, the existing cable operator may accept all applicable terms and conditions only in their entirety and in lieu of its existing franchise document and without the ability to accept specific terms and conditions. The locality and the existing cable operator shall amend the cable franchise of the existing cable operator to substitute the new, applicable terms and conditions upon notice of acceptance from the existing cable operator. An existing cable provider in a locality shall have an enforceable right to require that its cable franchise be amended and restated within 90 days of its request to substitute the new, applicable terms and conditions of the new negotiated franchise or new ordinance cable franchise granted to a new cable franchisee. Notwithstanding any other provision in this article, (i) no existing cable operator shall reduce the geographic area in which it actually provides cable service as of July 1, 2006, by the exercise of its rights under this article, but its service obligations within such service areas shall be subject to the service exclusions set forth in clauses (a) through (i) of subdivision 12 of § 15.2-2108.22 and (ii) the provisions of this section shall not alter the time period remaining in any unexpired, existing franchise.

§ 15.2-2108.27. Modification.

No locality, without the consent of the franchisee, shall accelerate the term of, require the renegotiation of, or otherwise modify in any way, an agreement with any entity or a franchise, ordinance, permit, consent, or other authorization for such entity to use the public rights-of-way because such entity has been granted a cable franchise under this article to use the public rights-of-way for the development and operation of a cable system.

§ 15.2-2108.28. Transfer.

No transfer of any franchise granted under this article shall occur without the prior consent of the locality, provided that such locality shall not unreasonably withhold, delay, or condition such consent.

No transfer shall be made to a person, group of persons or affiliate that is not legally, technically, and financially qualified to operate the cable system and satisfy the franchise obligations.

§ 15.2-2108.29. Surrender.

Notwithstanding the provisions of this article, a new cable franchisee that considers, within three years after the grant of a cable franchise under this article, that its provision of cable services within the locality is no longer economically feasible may notify the locality and surrender its cable franchise for the entire locality without liability to such locality. If a new cable franchisee surrenders its cable service franchise, it shall not be eligible to obtain a new cable service franchise within such locality until after the normal expiration date of the franchise that such franchisee surrendered. Such surrender of a cable franchise shall have no impact on other franchises held by the new cable franchisee or noncable services offered by the new cable franchisee.

§ 15.2-2108.30. Renewal.

A cable operator electing to renew its cable franchise shall do so (i) pursuant to the renewal procedures in 47 U.S.C. § 546 or (ii) by providing notice to the locality that it will opt into an ordinance cable franchise pursuant to this article. A cable operator may file such notification that its cable franchise will be renewed by an ordinance cable franchise not more than one year in advance of the expiration date of the existing franchise or by a renewal certification filed within 90 days after the effective date of this act in the case of a current cable franchise whose original, renewal, or extension term has expired. Except as provided by federal law, the restrictions in §§ 15.2-2015 through 15.2-2018, 15.2-2100 through 15.2-2105, 15.2-2106 and 15.2-2107, including, but not limited to, the advertisement and receipt of bids for cable franchises, shall not apply to renewal certifications except where a renewal would result in a city or town having granted a cable franchise and a renewal with combined terms in excess of 40 years.

§ 15.2-2108.31. Article construed.

The fact that any person obtains a negotiated franchise or ordinance cable franchise to provide cable services under this article shall not create any presumption that such person is providing cable services, is controlling or responsible for the management and operation of a cable system, or is a cable operator, for purposes of federal law.

§ 15.2-2160. Provision of telecommunications services.

A. Any locality that operates an electric distribution system may provide telecommunications services, including local exchange telephone service as defined in § 56-1, within or outside its boundaries if the locality obtains a certificate pursuant to § 56-265.4:4. Such locality may provide telecommunications services within any locality in which it has electric distribution system facilities as of March 1, 2002. Any locality providing telecommunications services on March 1, 2002, may provide ~~such~~ *telecommunications, Internet access, broadband, information, and data transmission* services within any locality within 75 miles of the geographic boundaries of its electric distribution system as such system existed on March 1, 2002.

B. A locality that has obtained a certificate pursuant to § 56-265.4:4 shall (i) comply with all applicable laws and regulations for the provision of telecommunications services; (ii) make a reasonable estimate of the amount of all federal, state, and local taxes (including income taxes and consumer utility taxes) that would be required to be paid or collected for each fiscal year if the locality were a for-profit provider of telecommunications services, (iii) prepare reasonable estimates of the amount of any franchise fees and other state and local fees (including permit fees and pole rental fees), and right-of-way charges that would be incurred in each fiscal year if the locality were a for-profit provider of telecommunications services, (iv) prepare and publish annually financial statements in accordance with generally accepted accounting principles showing the results of operations of its provision of telecommunications services, and (v) maintain records demonstrating compliance with the provisions of this section that shall be made available for inspection and copying pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

C. Each locality that has obtained a certificate pursuant to § 56-265.4:4 shall provide nondiscriminatory access to for-profit providers of telecommunications services on a first-come, first-served basis to rights-of-way, poles, conduits or other permanent distribution facilities owned, leased or operated by the locality unless the facilities have insufficient capacity for such access and additional capacity cannot reasonably be added to the facilities.

D. The prices charged and the revenue received by a locality for providing telecommunications services shall not be cross-subsidized by other revenues of the locality or affiliated entities, except (i) in areas where no offers exist from for-profit providers of such telecommunications services, or (ii) as permitted by the provisions of subdivision B 5 of § 56-265.4:4. *The provisions of this subsection shall not apply to Internet access, broadband, information, and data transmission services provided by any locality providing telecommunications services on March 1, 2002.*

E. No locality providing such services shall acquire by eminent domain the facilities or other property of any telecommunications service provider to offer cable, telephone, data transmission or other information or online programming services.

F. Public records of a locality that has obtained a certificate pursuant to § 56-265.4:4, which records

contain confidential proprietary information or trade secrets pertaining to the provision of telecommunications service, shall be exempt from disclosure under the Freedom of Information Act (§ 2.2-3700 et seq.). As used in this subsection, a public record contains confidential proprietary information or trade secrets if its acquisition by a competing provider of telecommunications services would provide the competing provider with a competitive benefit.

§ 56-265.4:4. Certificate to operate as a telephone utility.

A. The Commission may grant certificates to competing telephone companies, or any county, city or town that operates an electric distribution system, for interexchange service where it finds that such action is justified by public interest, and is in accordance with such terms, conditions, limitations, and restrictions as may be prescribed by the Commission for competitive telecommunications services. A certificate to provide interexchange services shall not authorize the holder to provide local exchange services. The Commission may grant a certificate to a carrier, or any county, city or town that operates an electric distribution system, to furnish local exchange services as provided in subsection B.

B. 1. After notice to all local exchange carriers certificated in the Commonwealth and other interested parties and following an opportunity for hearing, the Commission may grant certificates to any telephone company, or any county, city or town that operates an electric distribution system, proposing to furnish local exchange telephone service in the Commonwealth. In determining whether to grant a certificate under this subsection, the Commission may require that the applicant show that it possesses sufficient technical, financial, and managerial resources. Before granting any such certificate, the Commission shall: (i) consider whether such action reasonably protects the affordability of basic local exchange telephone service, as such service is defined by the Commission, and reasonably assures the continuation of quality local exchange telephone service; and (ii) find that such action will not unreasonably prejudice or disadvantage any class of telephone company customers or telephone service providers, including the new entrant and any incumbent local exchange telephone company, and is in the public interest. Except as provided in subsection A of § 15.2-2160, all local exchange certificates granted by the Commission after July 1, 2002, shall be to provide service in any territory in the Commonwealth unless the applicant specifically requests a different certificated service territory. The Commission shall amend the certificated service territory of each local exchange carrier that was previously certificated to provide service in only part of the Commonwealth to permit such carrier's provision of local exchange service throughout the Commonwealth beginning on September 1, 2002, unless that local exchange carrier notifies the Commission prior to September 1, 2002, that it elects to retain its existing certificated service territory. A local exchange carrier shall only be considered an incumbent in any certificated service territory in which it was considered an incumbent prior to July 1, 2002.

2. A Commission order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a new entrant shall be entered no more than 180 days from the filing of the application, except that the Commission, upon notice to all parties in interest, may extend that period in additional 30-day increments not to exceed an additional 90 days in all.

3. The Commission shall (i) promote and seek to assure the provision of competitive services to all classes of customers throughout all geographic areas of the Commonwealth by a variety of service providers; (ii) require equity in the treatment of the certificated local exchange telephone companies so as to encourage competition based on service, quality, and price differences between alternative providers; (iii) consider the impact on competition of any government-imposed restrictions limiting the markets to be served or the services offered by any provider; (iv) determine the form of rate regulation, if any, for the local exchange services to be provided by the applicant and, upon application, the form of rate regulation for the comparable services of the incumbent local exchange telephone company provided in the geographical area to be served by the applicant; and (v) promulgate standards to assure that there is no cross-subsidization of the applicant's competitive local exchange telephone services by any other of its services over which it has a monopoly, whether or not those services are telephone services. The Commission shall also adopt safeguards to ensure that the prices charged and the revenue received by a county, city or town for providing telecommunications services shall not be cross-subsidized from other revenues of the county, city or town or affiliated entities, except (i) in areas where no offers exist from for-profit providers of such telecommunications services, or (ii) as authorized pursuant to subdivision 5 of this subsection.

4. The Commission shall discharge the responsibilities of state commissions as set forth in the federal Telecommunications Act of 1996 (P.L. 104-104) (the Act) and applicable law and regulations, including, but not limited to, the arbitration of interconnection agreements between local exchange carriers; however, the Commission may exercise its discretion to defer selected issues under the Act. If the Commission incurs additional costs in arbitrating such agreements or resolving related legal actions or disputes that cannot be recovered through the maximum levy authorized pursuant to § 58.1-2660, that levy shall be increased above the levy authorized by that section to the extent necessary to recover such additional costs.

5. Upon the Commission's granting of a certificate to a county, city or town under this section, such county, city, or town (i) shall be subject to regulation by the Commission for intrastate

telecommunications services, (ii) shall have the same duties and obligations as other certificated providers of telecommunications services, (iii) shall separately account for the revenues, expenses, property, and source of investment dollars associated with the provision of such services, and (iv) to ensure that there is no unreasonable advantage gained from a government agency's taxing authority and control of government-owned land, shall charge an amount for such services that (a) does not include any subsidies, unless approved by the Commission, and (b) takes into account, by imputation or allocation, equivalent charges for all taxes, pole rentals, rights of way, licenses, and similar costs incurred by for-profit providers. Each certificated county, city, or town that provides telecommunications services regulated by the Commission shall file an annual report with the Commission demonstrating that the requirements of clauses (iii) and (iv) of this subdivision have been met. The Commission may approve a subsidy under this section if deemed to be in the public interest and provided that such subsidy does not result in a price for the service lower than the price for the same service charged by the incumbent provider in the area.

6. A locality that has obtained a certificate pursuant to this section shall (i) comply with all applicable laws and regulations for the provision of telecommunications services; (ii) make a reasonable estimate of the amount of all federal, state, and local taxes (including income taxes and consumer utility taxes) that would be required to be paid or collected for each fiscal year if the locality were a for-profit provider of telecommunications services, (iii) prepare reasonable estimates of the amount of any franchise fees and other state and local fees (including permit fees and pole rental fees), and right-of-way charges that would be incurred in each fiscal year if the locality were a for-profit provider of telecommunications services, (iv) prepare and publish annually financial statements in accordance with generally accepted accounting principles showing the results of operations of its provision of telecommunications services, and (v) maintain records demonstrating compliance with the provisions of this section that shall be made available for inspection and copying pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

7. Each locality that has obtained a certificate pursuant to this section shall provide nondiscriminatory access to for-profit providers of telecommunications services on a first-come, first-served basis to rights-of-way, poles, conduits or other permanent distribution facilities owned, leased or operated by the locality unless the facilities have insufficient capacity for such access and additional capacity cannot reasonably be added to the facilities.

8. The prices charged and the revenue received by a locality for providing telecommunications services shall not be cross-subsidized by other revenues of the locality or affiliated entities, except (i) in areas where no offers exist from for-profit providers of such telecommunications services, or (ii) as permitted by the provisions of subdivision B 5. *The provisions of this subdivision shall not apply to Internet access, broadband, information, and data transmission services provided by any locality providing telecommunications services on March 1, 2002.*

9. The Commission shall promulgate rules necessary to implement this section. In no event, however, shall the rules necessary to implement subdivisions B 5 iii and iv, B 6 ii through v, and B 8 impose any obligations on a locality that has obtained a certificate pursuant to this section, but is not yet providing telecommunications services regulated by the Commission.

10. Public records of a locality that has obtained a certificate pursuant to this section, which records contain confidential proprietary information or trade secrets pertaining to the provision of telecommunications service, shall be exempt from disclosure under the Freedom of Information Act (§ 2.2-3700 et seq.). As used in this subdivision, a public record contains confidential proprietary information or trade secrets if its acquisition by a competing provider of telecommunications services would provide the competing provider with a competitive benefit.

C. Article 5.1 (§ 56-484.7:1 et seq.) of Chapter 15 of this title shall not apply to a county, city or town that has obtained a certificate pursuant to this section.

D. Any county, city, or town that has obtained a certificate pursuant to this section may construct, own, maintain, and operate a fiber optic or communications infrastructure to provide consumers with Internet services, data transmission services, and any other communications service that its infrastructure is capable of delivering; provided, however, nothing in this subsection shall authorize the provision of cable television services or other multi-channel video programming service. Furthermore, nothing in this subsection shall alter the authority of the Commission.

E. Any county, city, or town that has obtained a certificate pursuant to this section and that had installed a cable television headend prior to December 31, 2002, is authorized to own and operate a cable television system or other multi-channel video programming service and shall be exempt from the provisions of §§ 15.2-2108.4 through 15.2-2108.8. Nothing in this subsection shall authorize the Commission to regulate cable television service.

§ 56-466.1. Pole attachments; cable television systems and telecommunications service providers.

A. As used in this section:

"Cable television system" means any system licensed, franchised or certificated pursuant to ~~§ 15.2-2108~~ *Article 1.2 (§ 15.2-2108.19 et seq.) of Chapter 21 of Title 15.2* that transmits television signals, for distribution to subscribers of its services for a fee, by means of wires or cables connecting

its distribution facilities with its subscriber's television receiver or other equipment connecting to the subscriber's television receiver, and not by transmission of television signals through the air.

"Pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, right-of-way or similar facility owned or controlled by a public utility.

"Public utility" has the same meaning ascribed thereto in § 56-232.

"Rearrangement" means work performed at the request of a telecommunications service provider or cable television system to, on or in an existing pole, duct, conduit, right-of-way or similar facility owned or controlled by a public utility that is necessary to make such pole, duct, conduit, right-of-way, or similar facility usable for a pole attachment. "Rearrangement" shall include replacement, at the request of a telecommunications service provider or cable television system, of the existing pole, duct, conduit, right-of-way, or similar facility if the existing pole, duct, conduit, right-of-way, or similar facility does not contain adequate surplus space or excess capacity and cannot be rearranged so as to create the adequate surplus space or excess capacity required for a pole attachment.

"Telecommunications service provider" means any public service corporation or public service company that holds a certificate of public convenience and necessity to furnish local exchange telephone service or interexchange telephone service.

B. Upon request by a telecommunications service provider or cable television system to a public utility, both the public utility and the telecommunications service provider or cable television system shall negotiate in good faith to arrive at a mutually agreeable contract for attachments to the public utility's poles by the telecommunications service provider or cable television system.

C. After entering into a contract for attachments to its poles by any telecommunications service provider or cable television system, a public utility shall permit, upon reasonable terms and conditions and the payment of reasonable annual charges and the cost of any required rearrangement, the attachment of any wire, cable, facility or apparatus to its poles or pedestals, or the placement of any wire, cable, facility or apparatus in conduit or duct space owned or controlled by it, by such telecommunications service provider or cable television system that is authorized by law, to construct and maintain the attachment, provided that the attachment does not interfere, obstruct or delay the service and operation of the public utility or create a safety hazard.

D. Notwithstanding the provisions of subsection C, a public utility providing electric utility service may deny access by a telecommunications service provider or cable television system to any pole, duct, conduit, right-of-way, or similar facility owned or controlled, in whole or in part, by such public utility, provided such denial is made on a nondiscriminatory basis on grounds of insufficient capacity or reasons of safety, reliability, or generally applicable engineering principles.

E. This section shall not apply to any pole attachments regulated pursuant to 47 U.S.C. § 224.

§ 56-502. Regulation by State Corporation Commission.

Every cooperative organized under this chapter shall be subject to the jurisdiction of the State Corporation Commission with respect to telephone services and facilities in the same manner and to the same extent as are other similar utilities under the laws of Virginia, except that (i) the Commission shall have no jurisdiction over the rates, service quality and types of service offerings of the cooperative to its members; (ii) a cooperative shall not be required to file a local service tariff with the Commission; and (iii) where a cooperative establishes a cable television system, it shall be subject to ~~§ 15.2-2108~~ *Article 1.2 (§ 15.2-2108.19 et seq.) of Chapter 21 of Title 15.2*.

2. That § 15.2-2108 of the Code of Virginia is repealed.

3. That in any locality in which the governing body of the locality has granted one or more new cable franchises during the 12-month period prior to July 1, 2006, that include an overlapping geographic service area with another cable franchise within that locality, all franchises within that locality shall remain in full force and effect until the earliest expiration date of the overlapping franchises or until one is terminated pursuant to the terms of the franchise and shall not be subject to the provisions of Article 1.2 (§ 15.2-2108.19 et seq.) of Chapter 21 of Title 15.2 of the Code of Virginia, except as set forth in this clause. A locality that has granted one or more new, overlapping franchises within the 12-month period prior to July 1, 2006, shall have the option not to offer, accept, or implement the ordinance cable franchise process described in § 15.2-2108.22 of the Code of Virginia until the earliest expiration date of the overlapping franchises, but may determine only to grant new cable franchises during such period through the negotiated cable franchise process. Any such locality, when granting any additional cable franchises after July 1, 2006, and until the existing cable franchises expire or are terminated pursuant to their terms, shall make the terms of any such newly granted franchise available, pursuant to § 15.2-2108.26 of the Code of Virginia, to all cable operators with existing franchises. Any locality in which the governing body of the locality has granted one or more new cable franchises during the 12-month period prior to July 1, 2006, that include an overlapping geographic service area with another cable franchise within that locality, shall make the terms of any such newly granted franchise available, in the manner described in § 15.2-2108.26, to all cable operators with existing franchises on the date the subsequent overlapping franchise was awarded. Upon the expiration of a current

cable franchise that is subject to this clause, this clause shall no longer be applicable to any cable franchise in such locality and the locality shall thereafter be subject to all provisions of Article 1.2 (§ 15.2-2108.19 et seq.) of Chapter 21 of Title 15.2 of the Code of Virginia.